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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

Kelly Broadcasting Company MMB File No. 910723A

For Temporary Redesignation
of Prime Time for Television
Station KCRA-TV,
Sacramento, California

MEMORANDUM OPINION AND ORDER

Adopted: August 29, 1991; Released: September 12, 1991

By the Commission: Commissioner Duggan issuing a separate statement.

1. On July 23, 1991, Jon S. Kelly, *et al.* d/b/a/ Kelly Broadcasting Company (Kelly), licensee of station KCRA-TV, Sacramento, California filed a petition requesting permission to use 6:00 - 10:00 p.m. as its prime time hours for purposes of the network television prime time access rule (Section 73.658(k)). Kelly seeks this authority, for an 8 1/2 month period, in order to conduct an experiment that would obtain data on audience preferences regarding the broadcast of an earlier prime time schedule. During this experiment, KCRA-TV proposes to broadcast its prime time network schedule beginning at 7:00 p.m., local news at 10:00 p.m., and the "Tonight Show" at 10:35 p.m. Eight parties filed comments and/or reply comments in response to a Public Notice seeking comment on the request. For reasons detailed below, we hereby grant Kelly's request.

2. With certain exceptions, the prime time access rule limits network affiliated stations in the top fifty television markets to the broadcast of no more than three hours of network or former network programming during the hours of prime time. For purposes of the rule, prime time is designated as 7:00 - 11:00 p.m. in the Eastern and Pacific time zones and 6:00 - 10:00 p.m. in the Central and Mountain time zones. The rule was adopted in 1970 to encourage the development and presentation of non-network programming during the hours of highest viewing.[1]

3. Kelly has requested that, as an experiment, it be permitted to adopt the prime time schedule currently used by licensees in the Central and Mountain time zones. Kelly states that its experiment is intended only to test its belief that the 7:00 - 11:00 p.m. prime time designation is no longer consistent with the life styles of most western state television viewers. In order to collect sufficiently reliable data as to the actual viewing preferences of its audience, Kelly requests that the test encompass an 8 1/2 month period so as to include three ratings "sweeps." Kelly submits that this experiment is consistent with the Commission's July 11, 1991 inquiry seeking information on "changes in the state of the video marketplace and the public policy implications of such changes."[2] Kelly believes that the data it collects may provide the basis for a more general inquiry into the validity of the current prime time designation for the Pacific time zone. Finally, Kelly states that its request in no way bears on the merits of the prime time access rule itself.

4. Two parties, NBC and the NBC Television Affiliates, filed comments in support of Kelly's request. NBC states that, in recent years, a growing number of affiliates on the west coast have sought permission to change their evening schedules in the same way that Kelly now proposes. While NBC is skeptical that the viewing preferences of west coast audiences have changed, it believes that an experiment such as this might be the only means by which to establish actual viewer preference. The NBC Affiliates point out that the access rule was adopted over 20 years ago and reflected the practices and viewing habits as they existed at that time. They see no harm to the public interest from a temporary experiment. To the contrary, the NBC Affiliates submit that the results of the test may yield information of significant value to the Commission's regulatory responsibilities.

5. Several parties filed comments raising objections to Kelly's proposal.[3] The comments filed in opposition collectively present four basic arguments. First, it is argued that KCRA-TV could present its prime time network schedule one hour earlier without the need for Commission approval. Second, opposing parties contend that because Commission approval is not necessary to accomplish a shift in the prime time schedule, the only purpose of the request is to air the "Tonight Show" during the established prime time period. Indeed, it is asserted that NBC required the broadcast of the "Tonight Show" at 10:35 in exchange for granting permission to shift the network program block to an hour earlier. Third, it is submitted that Kelly has failed to provide sufficient evidence or reasons for its request for an experiment regarding the prime time access rule. Fourth, several parties believe that, if granted, Kelly's request threatens the development of first run syndicated programming because Kelly's proposed schedule might reduce the amount of time available for such programming during the early prime time hours. In this regard, it is argued that Kelly's proposed experiment threatens the very purpose of the rule and thus would erode the rule

[1] Initially, the Commission adopted 7:00 - 11:00 p.m. as prime time in the Eastern, Mountain and Pacific time zones and 6:00 - 10:00 p.m. as prime time in the Central zone. However, in 1971, several licensees requested that the designation for the Mountain zone be changed to 6:00 - 10:00 p.m. to more accurately reflect the viewing habits of audiences in that region. The Commission in response allowed licensees in the Mountain zone to specify which designation of prime time they would adopt. In 1972, the Commission changed the prime time designation to 6:00 - 10:00 p. m. for all Mountain zone licensees.

[2] *Notice of Inquiry in Docket 91-221*, FCC 91-215, released August 7, 1991.

[3] Comments in opposition to Kelly's request were filed by the Association of Independent Television Stations (INTV), the Motion Picture Association of America, Fisher Broadcasting, Channel 40 Licensee, Inc. (Channel 40) and NATPE International. Comments filed by the Program Producers and Distributors Committee raise some of the same issues as opposing commenters, but do not oppose grant of KCRA's request.

itself. In addition to these arguments, INTV and Channel 40 submit that granting the request "on the eve of the 1991 television season" would cause significant disruption in the Sacramento market.

6. In reply comments, Kelly concedes that a portion of the experiment could be carried out without Commission approval, but submits that it needs to conduct the entire experiment as requested, including shifting the "Tonight Show," in order to compile sufficient data as to viewer behavior under a redesignated access period. Kelly contends that if a 6:00 - 10:00 p.m. prime time designation were to be adopted, the Commission would more accurately know whether viewer patterns had changed. Moreover, such a designation would more closely mirror the Central and Mountain time zones. With regard to the effect of the proposed experiment on syndicated programming, Kelly maintains that it is wrong to contend that the temporary shift in time of a single half hour on a single station could threaten the syndicated programming market or operation of the prime time access rule. INTV in its reply comments reiterates that a change in the prime time access designation is not necessary for KCRA-TV to move its prime time schedule forward and that the absence of any support for this request by other networks and their affiliates suggests that there is no critical need for this experiment. Kelly Broadcasting, it is argued, has not met its burden of justifying the need for the experiment.

7. Based on careful consideration of the record before us, we are granting Kelly's request for temporary redesignation of prime time hours. First, permitting such an experiment, designed to test the current validity of a designation adopted over two decades ago, is consistent with our general responsibility to ensure that our rules and policies are appropriate in light of current circumstances. We believe that the initial data submitted by Kelly as to viewer preferences and the experience of the NBC Affiliates raise enough of a question as to the continued relevance of the current prime time designation in the Sacramento market to allow a limited experiment for the purpose of collecting actual data on audience behavior. Superior data on this issue will benefit the public by assisting the Commission in any future determination of whether broader or more general changes in the prime time designations are appropriate.

8. Several commenters have indicated that Kelly could shift three hours of its current prime time schedule without a change in the official prime time hours. They are correct that, without any need for Commission involvement, the programming now broadcast between 8:00 and 11:00 p.m. could be moved to an hour earlier. However, we understand that the intended purpose of the experiment is to determine whether the local audience would benefit from a redesignation of the defined prime time hours -- bringing the 6:00 - 7:00 p.m. hour within the rule's coverage and removing the 10:00 - 11:00 p.m. hour from its coverage. To test this proposition, it is necessary that KCRA-TV be released from the restrictions of the rule after 10:00 p.m. so that the entire evening schedule may be shifted as it might if a more general redesignation took place. Adoption of a modified schedule within the existing prime time hours designation would not yield the desired data. To allow a test of public preferences it is necessary that KCRA-TV be permitted to broadcast an evening schedule as if the earlier prime time hours designation had been adopted.

9. Second, we do not believe that grant of Kelly's request will harm the public interest or have adverse consequences for other licensees or for the syndicated programming market. INTV argues that independent stations in Sacramento will be adversely affected by a "last minute" shift in programming on the part of KCRA-TV. INTV also recognizes, however, that KCRA-TV could accomplish the proposed shift of all but 25 minutes of the affected programming even in the absence of the request. Seen in this light, the net effect of our action here is to allow a shift of one program into the 7:00 - 11:00 p.m. time period. We do not believe that permitting such a shift in programming for 8 1/2 months will sufficiently affect other stations in the market to warrant a rejection of the request. In addition, as Kelly points out and as Channel 40 admits, last minute program changes often occur as television stations compete against one another for audiences. As for the effect on the syndicated programming market, we believe that the effects, if any, of the limited experiment authorized here will not be significant. While we note that it is ultimately the licensee's responsibility to determine what programming serves the needs and interests of its community at any given time, we find it consistent with the purposes of this experiment and not inappropriate if KCRA-TV chooses to program the "Tonight Show" at 10:35 p.m.

10. Finally, we stress that grant of Kelly's request is very specific and limited: for the period of September 16, 1991 to June 1, 1992, KCRA-TV may adopt 6:00 - 10:00 p.m. as its prime time viewing hours for purposes of Section 73.658(k) of the rules. KCRA-TV is required to comply with Section 73.658(k) in all other respects. In addition, grant of Kelly's request is contingent upon Kelly's agreement to provide to the Commission, within 60 days of the conclusion of the test period, a detailed report of the results of the experiment. This report should reflect all ratings data or other evidence obtained by the station which would help the Commission assess the continued validity of the current prime time designation for the Pacific time zone. This decision in no way alters the Commission's enforcement of the prime time access rule with respect to other licensees and changes to that rule would not be implemented except through the rulemaking process.

11. Accordingly, IT IS ORDERED that the request of Kelly Broadcasting Company for a temporary redesignation of "prime time" as defined in Section 73.658(k) of the Commission's Rules, 47 C.F.R. 73.658(k) IS GRANTED under the terms set forth above.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Separate Statement
of
Commissioner Ervin S. Duggan

In Re: Kelly Broadcasting Company, For Temporary Redesignation of Prime Time for Television Station KCRA-TV, Sacramento, California (MMB File No. 910723A)

I have voted to support a limited, temporary and experimental redesignation of KCRA-TV's prime time hours for two reasons: first, because the station's proposed eight-month experiment may yield useful information on possible shifts in viewer preferences; second, because this waiver does not significantly affect the substance of the prime time access rule.

Since it was promulgated in 1970, the prime time access rule has, in my judgment, served the public interest well. It has promoted program diversity by stimulating the first-run syndication business. And it has provided a reliable stream of revenue for local stations. I wish to emphasize, therefore, that the Commission's decision to approve the KCRA-TV experiment -- and my vote in particular -- does not signal any dissatisfaction with the prime time access rule, so long as the rule continues to serve the purposes for which it was established.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-170

In the Matter of

Spectrum Efficiency in the
Private Land Mobile Radio
Bands In Use Prior to 1968

ORDER EXTENDING COMMENT AND REPLY COMMENT PERIODS

Adopted: September 17, 1991 Released: September 23, 1991

By the Chief, Private Radio Bureau:

1. On July 2, 1991, the Commission released a *Notice of Inquiry*, 6 FCC Rcd 4126 (1991), (*Notice*), in this proceeding. The specified deadlines for comments and reply comments were October 25, 1991 and December 13, 1991, respectively.

2. On November 14, 1991, the Private Radio Bureau will hold a conference to discuss methods of satisfying the growing needs of private radio users in an era of increasing scarcity of spectrum. Industry representatives and policy makers will focus on the broad concerns raised in the *Notice*. An extension of the comment and reply comment deadline would provide members of the land mobile community the opportunity to prepare comments based in part on the conference and, thus, would provide the Commission with a more complete record in this proceeding. We conclude, therefore, that an extension of time is in the public interest. Accordingly, IT IS ORDERED, based on the authority in Section 0.331 of the Commission's Rules and Regulations, 47 C.F.R. § 0.331, that the deadline for filing comments in the subject *Notice of Inquiry* is extended to **January 15, 1992,** and the deadline for filing reply comments is extended to **March 2, 1992.**

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 12, 1991

COMMENTS INVITED ON WASHINGTON PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for Washington (Region 43).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, interested parties may file comments on or before **October 25, 1991** and reply comments on or before **November 12, 1991.** (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 91-270 Washington-Public Safety Region 43.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 24, 1991

SOUTHEAST MISSISSIPPI TELEPHONE COMPANY AND BPM, INC. FILE JOINT PETITION FOR WAIVER OF PART 36 RULES RELATING TO ADJUSTMENT OF MISSISSIPPI STUDY AREA BOUNDARIES

(PUBLIC COMMENT INVITED)

On August 30, 1991, Southeast Mississippi Telephone Company, Inc. (Southeast) and BPM, Inc. (BPM) filed a joint petition for waiver of the definition of "study area" and of certain provisions relating to jurisdictional allocation factors contained in Part 36 of the Commission's Rules. Southeast has purchased four of BPM's five exchanges in Mississippi. This waiver would allow BPM to remove the four exchanges from its Mississippi study area and Southeast to establish a new study area for these exchanges.

Parties may file comments on this petition no later than **October 9, 1991.** Replies should be filed by **October 23, 1991.** Comments should reference AAD 91-54. A copy of each pleading should be sent to Gene Gold, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to Downtown Copy Center (DCC), 1114 21st Street, N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from DCC.

For further information contact Gene Gold, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 24, 1991

THE ISLAND TELEPHONE COMPANY, TELEPHONE DATA SYSTEMS, INC., AND CONTEL OF MAINE FILE PETITION FOR WAIVER OF COMMISSION'S RULES RELATING TO PRICE CAPS AND TO REVISION OF MAINE STUDY AREA BOUNDARIES

(PUBLIC COMMENT INVITED)

On July 31, 1991, The Island Telephone Company (Island) and Telephone and Data Systems, Inc. (TDS) filed a joint petition for waiver of the Commission's Rules relating to the definition of "study area" contained in Part 36, the price cap merger and acquisition rule contained in Part 61, and the NECA pool reentry limitation contained in Part 69. Island also requested a temporary waiver to allow it to participate in average schedule settlements. On September 3, 1991, CONTEL of Maine, Inc. (CONTEL) filed a supplementary petition requesting a waiver of the definition of "study area." TDS, which intends to purchase Island, indicates that these waivers would allow Island to include two exchanges purchased from CONTEL in its Maine study area, allow the TDS companies to remain in the NECA cost pools and operate under rate of return regulation, and allow the revised study area to settle temporarily on an average schedule basis until cost data are developed. CONTEL indicates that it would make adjustments to its existing study area to reflect the elimination of the two exchanges.

Parties may file comments on this petition no later than **October 9, 1991.** Replies should be filed by **October 23, 1991.** Comments should reference AAD 91-55. A copy of each pleading should be sent to Gene Gold, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, to Mary Brown, Common Carrier Bureau, 1919 M Street, N.W., Room 518, Washington, D.C. 20554, and to Downtown Copy Center (DCC), 1114 21st Street, N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from DCC.

For further information contact Gene Gold, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS,
Complainant,

v. File Nos. E-90-11
E-90-13

NATIONAL EXCHANGE CARRIER ASSOCIATION, INC., AND THE MAJOR PARTICIPANTS IN ITS 1988 CARRIER COMMON LINE POOL
Defendants.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

ORDER

Adopted: September 18, 1991 Released: September 24, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On October 3, 1989, AT&T Communications (AT&T) filed the above-captioned complaints against the National Exchange Carrier Association, Inc. ("NECA"), alleging that the NECA carrier common line rate for 1988 was unjust and unreasonable in violation of 47 U.S.C. § 201(b). These actions were filed by AT&T as companion proceedings to complaints against certain local exchange carriers ("LECs") that participated in NECA's Carrier Common Line pool.

2. On September 16, 1991, AT&T filed a motion to dismiss these complaints with prejudice. AT&T states that as a result of discussions between the parties, the companion complaints have been dismissed by the Commission.[1] Therefore, AT&T concludes that no purpose would be served by the continued pendency of the proceedings against NECA.

3. We are satisfied that dismissal of these complaints will serve the public interest by eliminating the expenditure of further time and resources of the parties and of this Commission.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the request for dismissal of the above-captioned complaints IS GRANTED.

5. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

[1] AT&T Communications v. Pacific Bell, *et al.*, _____ FCC Rcd _____ (Enf. Div. Com. Car. Bur., released Sept. 3, 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

EASTERN MICROWAVE, INC. File No. I-T-C-91-130

Application for authority to provide
TV service between the U.S. and Canada.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: September 16, 1991 Released: September 25, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of television video and associated audio service between the U.S. and Canada by Eastern Microwave, Inc. (EMI).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-130 IS GRANTED and EMI is authorized to deliver three channels of television video and associated audio[1] received off-air at EMI's Italy Hill facility in Rochester, New York to Spencerville, Ontario, Canada via EMI's licensed terrestrial microwave facilities between Italy Hill, Rochester and Ogdensberg, New York.

3. IT IS FURTHER ORDERED that EMI shall file an application pursuant to Title III of the Communications Act of 1934, as amended, for the construction of necessary terrestrial microwave facilities, and the authority herein cannot be utilized prior to grant thereof.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between EMI and its correspondent in Canada and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that this authorization is subject to the condition set forth in paragraph 6 of the Commission's Order authorizing the provision of superstation programming to Canada.[2]

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] WHEC-TV (Ch. 10/NBC), WROC-TV (Ch. 8/CBS) and WROK-TV (Ch. 13/ABC).

[2] Southern Satellite Systems, Inc. *et al.*, 6 FCC Rcd 3542 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-380

In re Applications of

RIO GRANDE BROADCASTING CO.	File No. BPH-880815MV
ROBERTO PASSALACQUA	File No. BPH-880816NN
IRENE RODRIGUEZ DIAZ DE McCOMAS	File No. BPH-880816OR
UNITED BROADCASTING COMPANY	File No. BPH-880816OW

For Construction Permit for
New FM Station, Channel 247A,
Rio Grande, Puerto Rico

MEMORANDUM OPINION AND ORDER

Adopted: September 16, 1991 Released: September 26, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN. Board Member ESBENSEN issuing separate statement.

1. Before the Review Board is an Appeal filed by Irene Rodriguez Diaz De McComas (Appellant) on August 20, 1991 from the *Memorandum Opinion and Order*, FCC 91M-2432, released August 6, 1991 (*MO&O*) by Administrative Law Judge Joseph P. Gonzalez (ALJ), dismissing appellant's application. Her appeal lies "as a matter of right." 47 CFR § 1.301(a)(1). Appellant is supported by the Commission's Mass Media Bureau, but opposed by Roberto Passalacqua and Rio Grande Broadcasting Co.[1]

2. When appellant filed her application on August 16, 1988 (the deadline date of this Rio Grande "filing window"), her application contained only facsimile-transmitted signatures of McComas on the transmitter site certification page (Section VII, p. 1), and on the ultimate certification page (Section VII, p. 2). Both of those certifications were dated August 16, 1988. However, her Equal Opportunity Program Report (FCC Form 396-A), a report that is to be incorporated with all new broadcast applications, does apparently bear an original signature of McComas. (It is, however, dated August 15, 1988.) Nowhere did her application indicate overtly that the first two signatures were facsimiles. One day after the closing of the "filing window" (August 17), appellant's law firm forwarded to the Commission the "original signature pages," seeking to substitute the latter two pages for the former. Approximately two years later, the *Hearing Designation Order*, 5 FCC Rcd 5442 (1990), was released in this proceeding, but it was silent with respect to either the facsimile pages originally filed or the one-day late substitute pages.

3. Relying on *Mary Ann Salvatoriello*, FCC 91-243, released August 1, 1991, and responding to a Motion To Dismiss filed by Passalacqua on February 13, 1991, the ALJ stated:

> Mr. Passalacqua seeks the dismissal of the application of Mrs. McComas on the basis that her application, as filed, contained only a facsimile of the signature of the applicant in clear violation of Section 308(b) of the Communications Act of 1934, as amended. The Bureau supports the request on the basis that the McComas application was defective on its face and should have been returned as unacceptable for tender.
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> * * *
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> The Bureau and Mr. Passalacqua's position that an application bearing an electronically transmitted facsimile of the applicant's signature instead of a handwritten signature is defective and must be rejected has been adopted by the Commission. *See* Action by the Commission on July 31, 1991, by Memorandum Opinion and Order (FCC 91-243) [*Mary Ann Salvatoriello*]. *MO&O* at paras. 2-3. The Bureau, however, has since reversed its position and supports appellant's reinstatement. *See* Bureau Comments, *supra* note 1.

4. In *Salvatoriello*, the Commission affirmed the Mass Media Bureau's earlier dismissal of four applications that were said to have failed to meet the "tenderability" standards of the Commission's *Hard Look Order*,[2] because the applications failed to reflect the original signatures of those applicants, only facsimile signatures. Citing *Hard Look*, the Bureau had there refused, *inter alia*, Mary Ann Salvatoriello's request for permission to amend her application, one day late, by substituting original signature pages for the facsimile signature pages on her application.

5. In so affirming, however, the Commission distinguished the facts in *Salvatoriello* from the situation in *Josephine M. Rodriguez d/ba Cielo Communications*, 3 FCC Rcd 6752 (1988)(*Cielo*), where the Bureau had accepted as tenderable for filing an application containing no signatures whatever at key certification points, but where the *Cielo* applicant had affixed an original signature to the EEO section (FCC Form 396-A) of that application. Citing its *Hard Look Order* and *Cielo*, the *Salvatoriello* Commission iterated that:

> [i]f the needed information can be derived or the inconsistency resolved, confidently and reliably, drawing on the application as a whole, such defect will not render the application not sufficient for tender. However, if the critical data cannot be derived or the inconsistency resolved within the confines of the application and with a high degree of confidence, the presence of the clearly void data will be treated as functionally equivalent to the absence of such data. In such instances, the defec-

tive application will be deemed not sufficient for tender . . . [and] we will not permit the applicant to remedy the defect.

6. In explaining why, in reversing its position before the ALJ, it now supports the appeal before us, the Bureau asserts[5]:

> McComas now provides information which establishes that one of the three signatures on her application (her EEO certification) was handwritten. She notes that in the *Salvatoriello* case, the Commission, citing *Josephine M. Rodriguez d/b/a Cielo Communications*, 3 FCC Rcd 6752 (MMB 1988), held that where the EEO certification is hand signed, but Section VII of Form 301 is not, because of the similarities of the certification, the signature information could be derived within the confines of the application. The application in the *Cielo* case was found to be substantially complete and was designated for hearing.
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> * * *
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> A review of the McComas application establishes that it does in fact bear an original handwritten signature. Moreover, this signature is affixed to the EEO certification, which as the Bureau noted in *Cielo*, is essentially the same as the unsigned Section VII certification. Also, by comparing the handwritten signature with the facsimile signatures, the validity of the signatures could be determined on the face of the application without relying on any subsequently submitted amendment. Thus, it would appear that, pursuant to the Commission's interpretation of the *Cielo* case, the McComas application should be reinstated.

7. The Board has no greater reason than the Bureau to assume the inapplicability of *Cielo* to the situation at hand, or to hold that appellant's dismissal was compelled under the prevailing *Hard Look Order*.[6]

8. ACCORDINGLY, IT IS ORDERED, That the Appeal filed August 20, 1991 by Irene Rodriguez Diaz De McComas, and her Request For Extraordinary Relief and Petition for Leave to File, filed August 11, 1991, and the Motion for Acceptance of Corrected Opposition to Appeal, filed September 3, 1991 by Roberto Passalacqua ARE GRANTED; and the application of McComas (File No. BPH-880816OR) IS REINSTATED in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] In addition to the McComas Appeal, the following pleadings are here relevant: (1) McComas' "Motion for Extension of Time and Additional Pages and Request for Oral Argument," filed August 8, 1991. (By letter of August 12, 1991, the Board granted McComas an additional week in which to file her Appeal, but denied that motion in all other respects.); (2) McComas' "Request for Extraordinary Relief and Petition for Leave to File," filed August 22, 1991; (3) "Mass Media Bureau's Comments in Support of Appeal as of Right of . . . McComas," filed August 30, 1991; (4) Roberto Passalacqua's "Opposition to Appeal," filed August 30, 1991; (5) Rio Grande Broadcasting's "Opposition to Appeal," filed August 30, 1991; (6) Roberto Passalacqua's "Motion for Acceptance of Corrected Opposition to Appeal of . . . McComas," filed September 3, 1991; (7) Roberto Passalacqua's "Corrected Opposition to Appeal of . . . McComas," filed September 3, 1991; (8) Roberto Passalacqua's "Opposition to Request for Extraordinary Relief and Petition for Leave to File," filed September 3, 1991; and (9) Rio Grande Broadcasting's "Opposition to Request for Extraordinary Relief/Petition for Leave to File," filed September 5, 1991.

[2] *Report and Order* (Dkt. No. 84-750), 50 Fed. Reg. 19945 (1985), *recon. denied*, 50 Fed. Reg. 43157 (1985). (This *Hard Look Order* is reprinted in 58 RR 2d 776 (1985).)

[3] Those application dismissals by the Bureau were contained in its *Hearing Designation Order, Radio South Burlington, Inc.*, 5 FCC Rcd 1688 (1990).

[4] *Mary Ann Salvatoriello*, *supra*, at para. 12.

[5] Bureau Comments, *supra* note 1, at 2, 3.

[6] We also note that the Board has previously held in *George Henry Clay*, 5 FCC Rcd 317, 318 (Rev. Bd. 1990)(original emphasis), *recon. denied*, 5 FCC Rcd 2997 (1990), that:

> It is clear that these new [*Hard Look Order*] processing guidelines were and are intended to be applied at the *initial* staff review stage, and nothing in the Commission's discussion of its "hard look" policy suggests that it is to be again utilized once the hearing process has begun. Insofar as we are aware, the singular standard for application amendments, once a hearing has been designated, remains as set forth in Section 73.3522(b) of the rules, 47 CFR § 73.3522(b); under that standard, minor ministerial mistakes that do not disrupt the hearing proceeding are rather freely permitted. *See Northampton Media Associates*, 3 FCC Rcd 5164 (Rev. Bd. 1988) (subsequent history omitted); *see also Family Broadcasting Group*, 93 FCC 2d 771, 774-775 (Rev. Bd. 1983), *review denied*, FCC 83-559, released November 29, 1983. We shall not unilaterally extend, or apply retroactively by our own ukase, the processing standard established expressly for *initial* staff review of a broadcast application.

The Commission has never modified or spoken to *George Henry Clay*, so our view there remains unchanged.

SEPARATE STATEMENT OF BOARD MEMBER ERIC T. ESBENSEN

In light of the Commission's apparent ratification of *Cielo* in its very recent *Salvatoriello*, *see ante* paras. 5-6, I concur in the majority's legal analysis and the reinstatement of McComas' application. However, I respectfully submit that there remain substantial questions concerning the preparation and filing of McComas' application.

It has been a long-standing requirement that at least one copy of (FCC Form 301) applications must bear *original* signatures. *See* 47 CFR §§ 73.3153(a) and (c), adopted under the authority of 47 U.S.C. §§ 308(b) and 319(a). Indeed, as the Commission noted in *Salvatoriello*: "The Communications Act's signature requirement can be traced back to the Radio Act of 1927. *See Report No. 632*, H.R. 9971, 69th Congress, Section 21 (1927)." FCC 91-243 at n. 6. These provisions of the Communications Act and the Commission's Rules and Regulations were in full force and effect at the time McComas prepared and filed her application.

Also in effect at the time McComas filed her application were the Commission's specific FM application filing requirements adopted in its "*Hard Look Order*" (more than three years before McComas filed in this proceeding). In *Salvatoriello* (FCC 91-243 at paras. 2-3; footnotes omitted), the Commission recalled that:

> . . . [S]trict processing procedures . . . have applied to all applications for commercial FM facilities since 1985. *See Report and Order*, MM Docket No. 84-750, 50 Fed. Reg. 19936, [58 RR 2d 776] (May 13, 1985) (*Hard Look Order*), *recon. denied*, 50 Fed. Reg. 43157 (October 24, 1985), *aff'd without published opinion subnom. Hilding v. FCC*, 835 F.2d 1435 (9th Cir. 1987) . . . .
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> * * *
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> The *Hard Look Order* noted that the applicant's signature would be one of the items crucial to tenderability of commercial FM applications. *Hard Look Order*, Appendix D, 50 Fed. Reg. at 19946. The Bureau, relying on the *Hard Look Order*, read in conjunction with the signature requirements in Section 73.3513 of our Rules, found that the absence of original signatures on commercial applications are tenderability defects, and, as such, cannot be corrected after close of the filing window.

In spite of the foregoing requirements of the Communications Act, the Commission's Rules and Regulations, and the Commission's *Hard Look Order*, all in effect on August 16, 1988, McComas nevertheless caused her application to be filed absent two key original signatures. Further, and perhaps more significantly, although it is represented that McComas did actually and timely certify all portions of her application, it appears that the engineering section of her application was completed by her Virginia-based consulting engineer on August 15, 1988, only one day *before* her filing deadline. How appellant, a resident of Puerto Rico, was able to review that section of her application and certify in time to make the August 16 filing deadline is not at all clear. My own choice would have been to require, at a minimum, the submission of further evidence that appellant actually reviewed and timely certified the non-EEO sections of her application before the Board permitted reinstatement. *Cf. Hughes-Moore Associates, Inc.*, FCC 91I-062, released September 11, 1991 (further evidence demanded of timely submission of application-related material).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-638

In re Applications of	
SBM COMMUNICATIONS, INC.	File No. BPH-880816MM
HEIDI DAMSKY	File No. BPH-880816MW
GEORGE W. BARBER, JR.	File No. BPH-880816MY
GEORGE I. O'REAR	File No. BPH-880816NL
WEDA, LTD.	File No. BPH-880816NR
Willie Huff, Deborah Huff and Adrienne E. Lee, A Partnership d/b/a HOMEWOOD PARTNERS	File No. BPH-880816NU
HOMEWOOD COMMUNITY BROADCASTERS, LTD.	File No. BPH-880816OQ
For a Construction Permit for a New FM Station, Channel 247A, Homewood, Alabama	

MEMORANDUM OPINION AND ORDER

Adopted: September 16, 1991 Released: September 25, 1991

By the Commission: Commissioner Quello concurring in the result.

1. Before the Commission for consideration are: a Petition for Extraordinary Relief and an Emergency Motion for Stay, *Pendente Lite* filed August 21, 1991 and August 22, 1991, respectively by Heidi Damsky (Damsky); Comments on Petition for Extraordinary Relief filed August 27, 1991 by George W. Barber, Jr. (Barber); and an Opposition to Petition for Extraordinary Relief and Emergency Motion for Stay, *Pendente Lite* filed August 30, 1991 by the Mass Media Bureau. Damsky seeks Commission review of the Review Board's memorandum opinion and order affirming the decision of Administrative Law Judge Joseph Chachkin denying the settlement agreement filed on August 1, 1991 by the applicants in this proceeding and associated waiver and stay requests filed on August 9, 1991 by Barber and WEDA, Ltd. *SBM Communications, Inc.*, 6 FCC Rcd _____ (Rev. Bd. August 23, 1991).

I. BACKGROUND

2. On August 1, 1991, the seven remaining applicants in this proceeding filed a universal settlement under which Barber's application would be granted and the applications of SBM, Damsky, O'Rear, WEDA, Homewood Partners, and Homewood Community Broadcasters would be dismissed in exchange for the payment of consideration in varying amounts to each of the dismissing parties. Barber and WEDA later filed a request for a waiver of 47 C.F.R. § 73.3525 which, effective August 1, 1991, limits settlement payments to legitimate and prudent out-of-pocket expenses, since the settlement contemplates payments to some dismissing applicants in excess of this limitation.[1] Barber and WEDA also requested a suspension of procedural dates pending action on the joint agreement.

3. The ALJ found no justification for the requested waiver of the settlement limitations and therefore denied the joint petition, disapproved the settlement agreement and denied the request for suspension of procedural dates as moot. *See Memorandum Opinion and Order*, FCC 91M-2552 (Aug. 16, 1991). The ALJ noted that the Commission's decision to amend 47 C.F.R. § 73.3525 to limit settlement payments to legitimate and prudent expenses originally had an effective date of March 21, 1991, but that the effective date was subsequently extended to August 1, 1991. Therefore, the ALJ found that the applicants to this proceeding had had ample opportunity to reach a settlement before the new rule went into effect, and that their inability to reach a settlement before the deadline did not justify a waiver of the current payment limitations. Furthermore, the ALJ found that, since settlements are still permitted provided that they are limited to expenses, the applicants can readily achieve the public interest considerations cited in support of their waiver request, namely, initiation of Homewood's first aural service and conservation of Commission resources, simply by conforming their agreement to the new rules.

4. Barber appealed the ALJ's ruling to the Review Board, which affirmed the ALJ. The Board agreed with the ALJ that the effective date for the new settlement limitations in 47 C.F.R. § 73.3525 had already been deferred, making July 31, 1991 the last date for filing settlement agreements which contemplated payments in excess of legitimate and prudent expenses. In light of the Commission's previous extension of the effective date and in the absence of Commission-established criteria for determining whether the payment limitations in 47 C.F.R. § 73.3525 should be waived, the Board asserted that the Commission's July 31, 1991 deadline for filing settlement agreements under the former rule was firm. Accordingly, the Board denied the joint petition in all respects. *See SBM Communications, Inc.*, 6 FCC Rcd _____ at ¶¶ 4-5.

5. Damsky, a party to the proceeding and the joint settlement agreement, has now filed a petition for extraordinary relief and an associated request for stay. Damsky argues that a waiver of 47 C.F.R. § 73.3525 will serve the public interest for several reasons. First, the payments involved do not all exceed legitimate and prudent expenses, those that do are not of such a magnitude that they constitute the kind of profiteering which the payment limitations in the new rule were intended to prevent, and even the latter payments will meet the new standards within a few months of further litigation. Second, only two other agreements under the former provisions of 47 C.F.R. § 73.3525 were filed one day late.

Therefore, by limiting the waiver to settlements resulting from negotiations in progress as of the July 31, 1991 deadline and filed on August 1, 1991, approval of the instant settlement will not set a precedent for waiving the provisions of 47 C.F.R. § 73.3525 in the future. Third, the applicants who finalized settlement negotiations before the deadline should not be penalized because one hold-out applicant delayed the filing of the universal agreement.

II. DISCUSSION

6. We will deny Damsky's petition for extraordinary relief. A party seeking a waiver of a Commission rule must plead with particularity the facts and circumstances which warrant such action, and demonstrate that grant of the requested waiver would not undermine the public interest policy served by the rule. *See WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *quoting Rio Grande Family Radio Fellowship Inc.*, 406 F.2d 664 (D.C. Cir. 1968). The new provisions of 47 C.F.R. § 73.3525, which prohibit settlement payments in excess of legitimate and prudent expenses, were intended both to reduce or eliminate the incentive to file applications for profit and to expedite hearings by reducing the number of non-*bona fide* applications. By allowing good faith applicants to recoup their expenses and settle at any point in the proceeding, the Commission has struck a balance between preventing the use of Commission processes for profit and expediting the resolution of proceedings to facilitate new service to the public. *See Amendment of Section 73.3525 of the Commissions Rules Regarding Settlement Agreements Among Applicants for Construction Permits*, 6 FCC Rcd 85 ¶ 2 (1990), *clarified and modified on reconsideration*, 6 FCC Rcd 2901, 2902 ¶¶ 7-8 (1991). Damsky offers no reason sufficient to justify waiver of those limitations and therefore has failed to make the requisite showing.[2]

7. First, Damsky offers no support for her assertion that the applicants in this proceeding who agreed to settle for amounts in excess of their legitimate and prudent expenses will receive payments only slightly in excess of those expenses. Furthermore, even if Damsky had supported this assertion with the necessary accountings, waiver of the settlement limitations would not be justified. The new rule contemplates prohibiting all payments that exceed reasonable and prudent expenses, and provides no basis for a distinction based on the amount of consideration, in excess of those expenses, to be received.

8. Second, we reject Damsky's suggestion that a waiver of 47 C.F.R. § 73.3525 may be limited to those agreements under negotiation as of 5:30 p.m. on July 31, 1991 and subsequently filed on August 1, 1991. The Commission has already once extended the deadline and rejected any further delay in the effective date of the new rule. *See Amendment of Section 73.3525 of the Commission's Rules, on reconsideration*, 6 FCC Rcd 2901, 2902 ¶¶ 11-12. Specifically, we noted: "Pending applicants have had ample notice of our intention to impose settlement limits and can settle without any limits before the effective date of the rules adopted herein." *Id.* at 2902-2903 ¶ 12. [3] Granting a waiver of 47 C.F.R. § 73.3525 for only those applicants who were negotiating as of 5:30 p.m. on July 31, 1991, and who filed agreements relying on the old rule on August 1, 1991, would be unfair to those applicants who timely filed agreements[4] as well as those applicants who undertook negotiations that could not be finalized before the July 31, 1991 deadline and who therefore terminated their efforts to reach a settlement.

9. Finally, as the ALJ noted, denial of Damsky's request for a waiver of 47 C.F.R. § 73.3525 in no way prevents the parties from settling this proceeding. Thus, we are unpersuaded by Damsky's suggestion that a waiver of the payment limitations of the new rule in this case is appropriate to advance the Commission's policy favoring settlements. In this regard, the Commission also attaches considerable importance to deterring speculative applications by foreclosing the possibility of such applicants making a profit on settlements. This objective would be unnecessarily compromised by further extension of the effective date of the new settlement rule. In sum, Damsky has not made a showing warranting waiver of 47 C.F.R. § 73.3525 to further the public interest.

10. ACCORDINGLY, IT IS ORDERED, That, the Petition for Extraordinary Relief filed August 21, 1991 by Heidi Damsky IS DENIED.

11. IT IS FURTHER ORDERED, That the Emergency Motion for Stay, *Pendente Lite*, filed August 22, 1991 by Heidi Damsky IS DISMISSED AS MOOT in light of our disposition of this case.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Previously, 47 C.F.R. § 73.3525 specified no limit for settlement payments, but in order to settle for amounts in excess of out-of-pocket expenses under the old provisions, the settlement agreement had to be filed by July 31, 1991. *See Amendment of Section 73.3525 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits, on reconsideration*, 6 FCC Rcd 2901, 2902 ¶ 7 (1991).

[2] Barber, in his comments in support of Damsky's petition, notes that the settlement agreement is contingent on the suspension of procedural dates and the withdrawal of his integration commitment. Because the procedural dates were not suspended and the direct case exhibits were exchanged on August 23, 1991, Barber also requests a waiver of the *Ruarch* policy, which was modified in the Commission's hearing reform proceeding. The *Ruarch* policy, as modified, now requires that a successful applicant must fulfill its divestiture and integration proposals unless those proposals are withdrawn in conjunction with a settlement agreement filed by the date established for the exchange of exhibits. *See Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 3403 ¶ 6 (1991). Because we are denying Damsky's petition for extraordinary relief, Barber's waiver request is moot.

[3] In this regard, we note that the Commission first amended the provisions of 47 C.F.R. § 73.3525 in an order released on December 21, 1990. The changes in the rule were to be effective March 21, 1991. *See* 6 FCC Rcd at 85 ¶ 1. However, the Commission deferred the effective date of the new rule in an order released February 13, 1991, to allow for consideration of petitions for reconsideration. *See Amendment of Section 73.3525*

of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits, FCC 91-48 (Feb. 13, 1991). Following reconsideration, the Commission announced that as of August 1, 1991, the effective date of the new rules, the settlement payment limitations would apply to all applications. *See* 6 FCC Rcd at 2902 ¶ 8.

[4] That is, applicants that agreed to accept lesser payments in order to be able to file settlements prior to August 1.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-352

In re Applications of

Ronald E. Patterson & Cal E. Varner d/b/a CAPITOL CITY BROADCASTING COMPANY — File No. BPH-880812MZ

INGRAM & SCOTT COMMUNICATIONS LIMITED PARTNERSHIP — File No. BPH-880816NZ

MATTHEW WILLIAMS — File No. BPH-880816OC

For Construction Permit for a New FM Station on Channel 247C2 in Longview, Texas

MEMORANDUM OPINION AND ORDER

Adopted: September 18, 1991 Released: September 26, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

1. The Board has before it the Appeal of Ingram & Scott Communications Limited Partnership (Appellant), filed July 22, 1991, from the *Memorandum Opinion and Order*, FCC 91M-2061, released July 5, 1991 (hereinafter *Dismissal Order*) of Administrative Law Judge Edward J. Kuhlmann (ALJ), in which the ALJ dismissed appellant's application. The Board also has before it an accompanying Motion For Acceptance of Late-Filed Appeal filed by appellant on July 22, 1991,[1] and an Opposition thereto filed by Capitol City Broadcasting Company (Capitol) on August 1, 1991. In brief, the ALJ ultimately dismissed appellant's application "because it is unqualified for failure to timely demonstrate that it is financially able to construct and operate the proposed facility." *Dismissal Order* at para. 11.

BACKGROUND

2. Although the pertinent facts are not in dispute, it is useful at the outset to review them. Initially, when it filed its application in 1988, appellant claims to have been relying upon reasonable assurance of a loan from the East Texas State Bank. That bank, owned (in major portion) by the family of Kent Foster, a 50% "limited" partner of the instant appellant, failed in November 1988. Appellant did not report that bank failure or the lapse of its original financing to the FCC. Instead, it claimed to have later substituted its reliance to a March 22, 1989 letter from the National Bank of Washington (NBW),[2] a bank that also failed in the summer of 1990, and was officially taken over by the FDIC on August 10, 1990. *See Memorandum Opinion and Order*, FCC 91M-1766, released May 31, 1991.[3] Although Foster, who seems to be appellant's mainspring in connection with its financing, was quickly advised that NBW's successor (Riggs National Bank) would not honor NBW's March 1989 "assurance" of a ($350,000) loan to appellant, it was not until October 1990 that appellant advised the forum (and the parties) that it no longer had reasonable assurance of station financing.

3. Consequently, on October 10, 1990, a Petition To Enlarge Issues was filed by competing applicant Matthew Williams, who asserted that without its ability to rely upon NBW, appellant had failed to demonstrate its financial qualifications. In response to that petition, the ALJ added appropriate financial issues against appellant. *See Memorandum Opinion and Order*, FCC 90M-3837, released December 5, 1990. When appellant thereafter filed no financial amendment, Williams then filed on March 20, 1991 a Motion to Dismiss appellant's application, again for lack of financing. In an opposition pleading filed on April 2, 1991, appellant represented that it would seek permission to amend its application to reveal its financial qualifications within two weeks; and on April 17, 1991, appellant did seek permission to amend to show reliance on a ($500,000) loan from Far East National Bank.[4] Appellant filed a supplement to its amendment on April 30, seeking to respond to additional questions raised by the ALJ in an order he had released on April 19 (*see supra* note 4).

4. However, after reviewing appellant's request to amend and the opposition pleadings of two competing parties, the ALJ rejected appellant's amendment, holding that: (1) appellant did not state exactly *when* it actually learned that it lacked reasonable assurance of NBW funding; (2) though appellant probably knew as early as August 1990 that it lacked assurance of NBW financing, it apparently did nothing to obtain financing prior to the prehearing conference on October 16, 1990, or prior even to the date on which discovery was due to begin; and, indeed, it apparently did nothing until mid-December when its counsel contacted an equipment supplier and a lease company (following the addition of financial issues against appellant); (3) appellant's "general" partners, Madolyn Scott and Dorothy Ingram, apparently made no effort on their own to obtain adequate financing; and (4) appellant did not report an alleged new financing source until April 17, 1991, and the eight-month delay in tendering an entirely new financial proposal left essentially no time for opponents to explore that new proposal. *See Memorandum Opinion and Order*, FCC 91M-1766, released May 31, 1991, at paras. 6-7. The ALJ there exclaimed:

> In this case, [appellant] took eight months, but those months were during the discovery period. Moreover, its finances and the participation of Kent Foster were the subject of an issue. On April 30, 1991, after having been informed on December 3, 1990, that it would have to explain whether it relied on Kent Foster for financial support, [appellant] proposed to amend its partnership agreement to exclude any reliance on Kent Foster. No explanation is provided for why that decision could not have been made earlier or revealed before the end of the discovery period. There is no question that [appel-

> lant] has not demonstrated that it has been diligent. It also appears that [appellant's] belated actions with regard to Kent Foster exhibit bad faith.

5. In the ensuing *Dismissal Order* here under direct appeal, the ALJ held that appellant had been found in his May 31, 1991 order to have failed to demonstrate "good cause" for the acceptance of its April 1991 financial amendment; that it was in turn basically unqualified; and that its application was therefore dismissed. *Id.*, at para. 11.

APPEAL

6. As it did before the ALJ, appellant here contends that it did demonstrate "good cause" for its April 1991 amendment and fully met the applicable legal test. Thus, it submits that after it learned that it could no longer rely on NBW, it contacted several prospective financial sources. It also claims that it retained Sarah McCue and James Rapp of Washington, D.C. to "help speed up the process of obtaining financing."[5] And, appellant claims to have solicited equipment offers from two leasing companies, Park Leasing and Harris Corp. But, claims appellant's Kent Foster:

> As the bankers were not willing to consider a financing proposal that was being "shopped" to a large number of lenders at the same time, we were severely limited in the number of lenders we could deal with at any one time. It is my understanding that [appellant's] . . . other limited partner, Joe Blanks, also unsuccessfully sought financing for [appellant].

He further asserts:

> Despite these strenuous efforts, [appellant] was unable to obtain financing for the proposed station until the Far East National Bank committed.

Foster Declaration, *supra* note 5, at 3.[6]

7. Appellant maintains that its late amendment did not disrupt either discovery or otherwise impede the orderly conduct of this proceeding. Relying upon *Radio Associates, Inc.*, 6 FCC Rcd 2094 (Rev. Bd. 1991), appellant asks the Board to reverse the ALJ's determination that it lacked "good cause" to amend and to permit it to demonstrate its financial qualifications at hearing. *See* Appeal 3-4. In response, Capitol asserts that appellant was aware of its burden to make a strong "good cause" showing for its April 1991 amendment, that failed to do so adequately, and that its lack of diligence in securing financing is fatal to its appeal.

DISCUSSION

8. As a preliminary matter, we must agree that Capitol is correct in characterizing this untimely appeal (*see supra* note 1) as "symptomatic" of the actions of appellant throughout this proceeding. Appellant itself recognizes that the test for "good cause" for postdesignation amendments was established in *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970), to wit:

> (1) the amendment was persued with due diligence;
>
> (2) it was not required by the voluntary act of the applicant;
>
> (3) it will not necessitate modification or addition of issues or parties;
>
> (4) it will not disrupt the orderly conduct of the hearing or necessitate an additional hearing;
>
> (5) it will not unfairly prejudice the other parties;
>
> (6) and it will not cause the applicant to gain a comparative advantage.

As we have frequently noted, while the Commission has relaxed somewhat the *O'Conner* test when treating basic qualifying matters, *see, e.g., Royce Int'l Broadcasting Co. v. FCC*, 820 F.2d 1332 (D.C. Cir. 1987), the Commission has likewise put a premium on both hearing expedition and complete candor when considering postdesignation amendments. Thus, the question of whether the applicant has truly exercised "due diligence" in overcoming a defect of which it is (or should have been) aware remains the vital inquiry. *See, e.g., California Broadcasting Corp.*, 6 FCC Rcd 283, 284 (1991); *see also Radio Associates, Inc., supra*; *Edwin A. Bernstein*, 4 FCC Rcd 8420 (Rev. Bd. 1989), *review denied*, 5 FCC Rcd 2843 (1990), *aff'd per judgment sub nom. Lefebvre v. FCC*, 926 F.2d 1215 (D.C. Cir. 1991).

9. Thus, while Kent Foster claims to have made initial contact with several prospective funding sources when reliance on NBW became untenable after its failure in August 1990, appellant *conspicuously* fails to indicate just *when* these speculative funding sources were first approached. Hence, we are absolutely unable to discern whether appellant did, in fact, take immediate steps once it became aware that NBW could no longer be relied upon as a potential loan source. The burden is squarely on the applicant seeking to amend to fully demonstrate "due diligence." *See Royce Int'l, supra*; *see also, e.g., Sharon Annette Haley*, 6 FCC Rcd 4630 (1991) (late financial amendment rejected); *Radio Associates, Inc., supra*.[7] Here, appellant became aware no later than August (or early September) 1990 that its critical reliance on NBW could no longer be maintained. But not until April 1991 did appellant finally seek permission to amend, and we are presented with scant demonstrative evidence of the timeliness of appellant's remedial actions between those two temporal points.

10. Further, even if we overlooked appellant's failure to demonstrate persuasively "due diligence" between August 1990 and April 1991, we observe that the facts here appear to be similar, if not identical, to those obtaining in *Texas Communications Limited Partnership*, FCC 91-270, released September 4, 1991. The Commission was there also concerned with one of a skein of applications in which Kent Foster, as a financial rainmaker, presumably received its original loan commitment from the East Texas State Bank (ETSB), but later turned to NBW after the collapse of ETSB. *See supra* note 2. In there refusing to permit a comparably situated applicant to amend its financing (also after NBW became defunct), the Commission noted that ETSB became insolvent in November, 1988. However, the applicant there utterly failed to inform the Commission that it had ever lost its putative ETSB financial commitment in 1988. The *Texas Communications* Commission held:

> Although [the applicant] secured [a replacement] letter from NBW in March 1989, to replace ETSB's loan commitment, [it] failed to report ETSB's November 1988 insolvency and [its] subsequent "backup letter from NBW until July [1989] . . . . [It] did not, however, account, for its lack of diligence in bringing the pertinent facts to the Commission's attention.

Id., at para. 8. The Commission went on to conclude that the later reliance on alleged new financing:

> does not eliminate the necessity to consider whether acceptance of the NBW letter would require the addition of issues; namely, whether [the applicant's] failure to report both ETSB's insolvency and its reliance on a new bank letter, *clearly substantial changes in matters that could have decisional significance in this proceeding*, reflects a lack of candor and an intent to deceive concerning these changes in its financial proposal. Under these circumstances, it is clear that [the applicant] failed to show first that it proceeded with due diligence in light of the lengthy period of time involved here, and second, that no additional issues would be necessitated. *See Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (1970). In the absence of an amendment and the requisite showing of good cause, the NBW letter was never a part of [the applicant's] financial proposal and [the applicant] had no basis for relying on it.

Id., at para. 9 (emphasis added). So too here, a hearing issue might well be necessary to determine whether appellant lacked candor in failing to report promptly that, in the wake of ETSB's 1988 insolvency, it no longer had any commitment for bank financing; and indeed could not even allege that it had obtained a new financial commitment until March 1989. We perceive *Texas Communications* to be on point in this regard as well.[8]

11. ACCORDINGLY, IT IS ORDERED, That the Appeal filed July 22, 1991 by Ingram & Scott Communications Limited Partnership IS DENIED; and

12. IT IS FURTHER ORDERED, That its Motion For Acceptance of Late-Filed Appeal filed July 22, 1991 IS GRANTED, to the extent indicated in footnote 1 of this order.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Appellant asserts that although its appeal was due on (Thursday) July 17, 1991, it could file no earlier than (Monday) July 22, 1991, and it accompanied its July 22 appeal with a Motion For Acceptance Of Late-Filed Appeal. Counsel asks that we excuse his lateness because he was engaged personally in a remand hearing in a multiparty comparative case in Mableton, Georgia, and needed additional time to adequately prepare this appeal. However, we agree with Capitol City that, read together, Sections 1.4 and 1.301(c)(2) of the rules mark July 15 as the due date for this appeal; and particularly in view of the emphasis on expedition contained in *Proposals To Reform the Commission's Comparative Hearing Process To Expedite The Resolution of Cases*, 6 FCC Rcd 157 (1990), dismissal of this appeal on procedural grounds alone might be easily justified.

Nevertheless, should any higher reviewing authority find that this appeal should not be dismissed because of its lateness, *see, e.g., Community Coalition For Media Change v. FCC*, 646 F.2d 613, 616 (D.C. Cir. 1980)(although counsel rebuked for lateness, appeal considered on merits); *HBZ Communications, Inc. v. FCC*, 825 F.2d 516 (D.C. Cir. 1987); *cf. South Carolina Radio Fellowship*, FCC 91-255, released August 13, 1991 at n.1, we state the Board's views as to why the ALJ did not err in his dismissal.

[2] It appears that Foster had purportedly obtained financial commitments from NBW for applicants in the following markets:

Albuquerque, New Mexico
Beaumont, Texas
Longview, Texas
Knoxville, Tennessee
Lexington-Fayette, Kentucky
Shreveport, Louisiana
Leland, North Carolina

See Appeal, Attachment 1, Exh. 1 to Supplement To Petition For Leave To Amend. Just recently, the Commission affirmed the disqualification of Foster's applicant in the Beaumont, Texas case for actions relating to its finances. *See Texas Communications Limited Partnership*, FCC 91-270, released September 4, 1991, a case we notice *infra* para. 10 of this text.

[3] Because we affirm the ALJ's dismissal of appellant for its failure to demonstrate "good cause" to amend to a new financial proposal, and as we did in our own decision in *Texas Communications Limited Partnership*, 5 FCC Rcd 5876, 5877 (Rev. Bd. 1990), we do not reach the question of whether appellant's purported loan commitments from either East Texas State Bank or National Bank of Washington were valid or merely idle accommodations to Kent Foster.

[4] By coincidence, apparently, the ALJ had adopted on April 17, 1991 an order rejecting Williams' Motion To Dismiss appellant, stating that "it is premature to dismiss" appellant and affording appellant until April 30, 1991 to file an amendment in response to the financial issues outstanding against it. *Memorandum Opinion and Order*, FCC 91M-1312, released April 19, 1991.

[5] Appeal, Attachment 1, Exh. 5 to Supplement To Petition For Leave To Amend (Foster Declaration) at 2. However, so far as we are aware, appellant does not further identify McCue or Rapp, nor does it describe their functions and/or activities.

[6] Foster's declaration also asserted that "[s]ince the demise of NBW, I have been a full-time employee of the federal government, which placed limitations on my ability to seek alternative financing." *Id.*, at 2. Be that as it may, the Commission requires "due diligence" in application amendments, not only so that the schedules of its own government workers are not disrupted but -- more importantly -- so that *the public* (including any other competing applicant) receives an expeditious resolution of these hearing cases. *See Proposals To Reform the Commission's Comparative Hearing Process, supra* note 1.

[7] Appellant here misrelies completely on *Radio Associates, supra*. In that case, we were faced with the argument that the ALJ had erred in requiring the aggrieved applicant to show "good cause" for a postdesignation financial amendment, whereas that applicant claimed it could freely amend (as a matter of right) without a "good cause" showing. We there agreed with the ALJ, and returned the proceeding to him so that the applicant might attempt a "good cause" showing. Here appellant was afforded that opportunity by the ALJ, but failed to meet the *O'Conner* standards for late amendments.

[8] In this regard, nowhere does appellant suggest to the Board that it promptly reported the loss of its purported ETSB financing in 1988. Without such a prompt report, candor (and associated) issues against appellant would seem to be in order. *Marlin Broadcasting of Central Florida, Inc.*, 5 FCC Rcd 5751, 5752 & n.9 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Policies and Rules Concerning Children's Television Programming	**MM Docket No. 90-570**
Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations	**MM Docket No. 83-670**

ORDER

Adopted: September 20, 1991 Released: September 20, 1991

By the Commission:

1. CBS, Inc. (CBS) has petitioned for an extension of the October 1, 1991, effective date for application of commercial limits to children's television programming.[1] In response to a request by the Association of Independent Television Stations, Inc. (INTV) and the National Association of Broadcasters, we previously extended the effective date for application of the commercial limits from October 1, 1991 until January 1, 1992, with respect to children's programs acquired pursuant to barter contracts entered into prior to April 12, 1991.[2] CBS seeks a similar extension for network children's programs, or alternatively, for all non-barter children's programming. Other television broadcast networks support CBS.[3] INTV favors an extension of the effective date to January 1, 1992, for all programs, barter and non-barter.[4]

2. CBS argues that there is no legitimate basis either for postponing application of the commercial limits for barter programs but not for other programs, or for thus granting barter programs a competitive benefit. The Children's Television Act, it is noted, suggests no distinctions based on modes of program acquisition or a station's economic circumstances. Although arguing that the date of program acquisition should not be relevant, CBS notes, with specific examples, that many network children's programs for the fall season are licensed from producers under contractual terms determined substantially prior to the Commission's April 1991 promulgation of rules or the 1990 enactment of the Children's Television Act. Selective postponement of commercial limits, it is said, grants certain stations a windfall competitive advantage, as they are able to offer additional inventory to advertisers and divert sales away from networks and network affiliates. The CBS Network reportedly includes up to 5 minutes of network commercial time per half hour in weekend children's programs and provides each affiliate with an additional 30 seconds per half hour in which it may place its own commercial announcements. (This practice has assertedly been followed since 1989.) Thus, for the period in question, an excess of 30 seconds per hour above the commercial limits is potentially involved for the CBS Network. CBS states that, following reports of the extension for barter programs, advertisers withdrew over $1.5 million from CBS' children's program commercial schedules.[5]

3. Action for Children's Television (ACT) and other parties jointly opposing CBS' request stress that the Commission has no responsibility to guarantee network profits and that, in any case, neither persuasive argument nor specific evidence has been presented sufficient to meet the traditional waiver standard.[6] Further, opponents of the waiver argue that CBS has not demonstrated that it is unable to mitigate any losses involved.

4. In extending the commercial time limits compliance date with respect to barter programs, we acted to avoid what appeared to be a significant financial hardship to television stations holding barter contracts that could be mitigated in substantial measure by a brief additional transition period. In taking that action, however, we did not intend to create competitive inequities within the markets involved. CBS concedes that there is no evidence causally linking the barter program extension to network loss of advertising revenues, and, indeed, it is not clear how such a linkage might be evidentially established given the time frames here involved. We are concerned, nevertheless, that extending the effective date for imposition of commercial limits for one category of children's programming may inadvertently create an economic preference for that type of programming (*i.e.*, barter programming) and by inference, a preference for that group of broadcasters or cable operators most likely to air barter programming. We agree with CBS that the Act does not justify differentiating among affected parties based on their mode of program acquisition.[7] Given the already

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[1] CBS Inc. Petition for Waiver of Effective Date of Children's Television Commercial Limits, MMB File No. 910802A (filed Aug. 2, 1991) (CBS Petition). The Commission established an October 1, 1991, effective date for implementation of the requirements of the Children's Television Act of 1990 (the Act), 47 U.S.C. §§ 303a, 303b, 394, including imposition of commercial limits of 10.5 minutes per hour on weekend and 12 minutes per hour on weekday children's programs aired on broadcast and cable television. *Report and Order*, MM Docket Nos. 90-570 and 83-670, 6 FCC Rcd 2111 (*April 12 Order*), *Erratum*, 6 FCC Rcd 3535, *on reconsideration*, FCC 91-248, 6 FCC Rcd 5093, (released Aug. 26, 1991) (*Reconsideration Order*).

[2] *Reconsideration Order*, paras. 48-51.

[3] Response to Petition for Waiver of Capital Cities/ABC, Inc., MMB File No. 910802A (filed Aug. 16, 1991); Comments of National Broadcasting Company, Inc., MMB File No. 910802A (filed Aug. 16, 1991).

[4] Comments of INTV, MMB File No. 910802A (filed Aug. 16, 1991) at 2.

[5] CBS Reply to Opposition to Petition for Waiver, MMB File No. 910802A (filed Aug. 23, 1991), at 3-5 (CBS Reply); CBS Petition at 2.

[6] Joint Opposition To Petition For Waiver by Action for Children's Television, National Association for Better Broadcasting, National Education Association, American Association of School Administrators, and Washington Association for Television and Children, MMB File No. 910802A (filed Aug. 15, 1991), at 3-4 (Joint Opposition).

[7] CBS Reply at 3. It is true, as INTV states, that the barter program extension applies to all stations, independents as well as

uncertain economic climate for broadcasters, we are hesitant to create a regulatory regime that may unintentionally favor one industry group, to the ultimate detriment of the public. As we stated in granting the barter programming extension, negative economic repercussions caused by immediate implementation of the commercial limits can jeopardize the financing of children's programming throughout the year, contrary to the overall goals of the Act and the public interest.[8]

5. Although CBS has styled its request as a petition for waiver, we believe that it is more appropriate to address this issue in the context of the rulemaking proceeding. Accordingly, we will reconsider the effective date for application of the commercial limits on our own motion.[9] For the reasons given above, we conclude that both the public interest and the purposes of the Children's Television Act will be served by extending the effective date for application of the commercial limits until January 1, 1992 for all broadcast and cable programs, barter and non-barter, network and non-network, regardless of when the programming was acquired. We remind affected parties, however, that the October 1, 1991 effective date remains in force for all other aspects of our rules implementing the Act, including those rules and policies pertaining to the programming renewal review requirement.[10]

ORDERING CLAUSE

6. Accordingly, IT IS ORDERED THAT pursuant to the authority contained in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154 and 303, and the Children's Television Act of 1990, 47 U.S.C. §§ 303a and 303b, the October 1, 1991 effective date for imposition of commercial limits IS HEREBY EXTENDED, effective immediately upon release of this Order, to **January 1, 1992** for all children's programs.[11]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

FINAL REGULATORY FLEXIBILITY ANALYSIS STATEMENT

I. Need and Purpose of this Action:

1. An extension of the effective date for application of commercial limits to children television programming from October 1, 1991, to January 1, 1992, is granted for all children's programs, to ensure that all affected parties are treated without preference, and to avoid the financial ramifications likely if the limits were to be applied immediately to some, but not all affected parties, thus removing a possible deterrent to providing children with quality educational and informational programming.

II. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis:

2. No comments were submitted in response to the Initial Regulatory Flexibility Analysis related to the issue of the effective date for enforcement of the commercial limits.

III. Significant Alternatives Considered and Rejected:

3. The Commission considered either denying any type of extension of the effective date, or granting an extension only to network children's programs. In light of the extension already granted to children's programs acquired pursuant to barter contracts entered into prior to April 12, 1991, the Commission determined that the only alternative which would be fair to all affected parties and most in compliance with the goal of the Children's Television Act of 1990, would be to grant an extension for imposition of the commercial limits on all children's television programs, barter and nonbarter.

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network affiliates, that entered into non-cash contracts for children's programming prior to April 12, 1991. INTV Reply at 2-3. However, network affiliates are more likely to air non-barter children's programs, because the network programs they air are not negotiated on a barter basis. Thus, the effect of the barter programming extension is likely to bestow disproportionate benefit on independent stations as opposed to network affiliates.

[8] *Reconsideration Order*, para. 51.

[9] *See* 47 C.F.R. § 1.108.

[10] In addition, giving the additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compliance. Thus, we note that, in the context of any enforcement action for violations of the limits, we would be unlikely to be sympathetic to claims of transitional difficulties.

[11] As this action involves relieving affected parties of a restriction on a temporary basis, it is permissible to make the change effective less than 30 days after publication in the Federal Register. 5 U.S.C. § 553(d)(1); 47 C.F.R. § 1.427(b).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-273

In the Matter of

Amendment of Part 63 of the
Commission's Rules to Provide
for Notification by Common
Carriers of Service Disruptions

NOTICE OF PROPOSED RULEMAKING

Adopted: September 16, 1991 Released: September 19, 1991

Comment Date: November 26, 1991
Reply Date: December 30, 1991

By the Commission:

1. This Notice of Proposed Rulemaking proposes to amend the Commission's rules to provide requirements that facilities based-common carriers notify the Commission when telecommunications services provided by their networks are disrupted. We propose to amend Part 63 of our rules, as set forth in Appendix A, to require any facilities-based common carrier providing access service or interstate or international telephone service to report incidents during which service to 50,000 or more of its customers or voice grade equivalent circuits is disrupted for 30 minutes or more.

2. Recently, a number of incidents have occurred in which the introduction of new technology into the telecommunications infrastructure has led to service disruptions. In January of 1990, for example, AT&T experienced a large scale service failure when software used with its Signalling-System 7 (SS7) network contained a coding error. Other major interexchange carriers also have experienced outages associated with the introduction of SS7. In June and July of this year, local exchange carriers Pacific Bell and Bell Atlantic also experienced major outages.

3. Currently, the Commission has no systematic way by which to become informed quickly of significant service disruptions. We also are unable to determine whether particular kinds of technology or equipment are threatening service reliability. Our quality of service reporting requirements, adopted as part of incentive regulation for certain local exchange carriers, require subject carriers to file semiannual and quarterly reports indicating periods of switch downtime, trunk blockage, service quality complaints, dial tone response, and customer satisfaction.[1] Those service quality reports, while necessary and useful to evaluate the short term and long term impact of price caps on the provision of service by local exchange carriers, do not provide the Commission with sufficiently timely or specific information regarding service disruptions. Nor do those reports require common carriers to evaluate and report the apparent or known causes of service disruptions or the steps taken to restore service and to prevent further outages. Finally, the reports we are proposing herein will provide information on carriers not subject to price cap reporting. Their experience will be valuable in assessing trends.

4. Therefore, we propose to amend our rules to require the filing of service disruption reports by any facilities-based common carrier that provides access service or that provides interstate or international telephone service. Under this proposal, reports would be required when such a carrier experiences a loss of telephone service to 50,000 or more of its customers or voice grade equivalent circuits, if the service loss continues for 30 or more minutes. Carriers would be required to notify the Commission within 90 minutes of the commencement of the service outage. Notification would be served on the Commission's Monitoring Watch Officer, on duty 24 hours a day, by facsimile or other record means delivered to Commission headquarters. The notification should identify a contact person for further information, the telephone number at which that person may be reached, and provide what information is known at the time about the outage. Carriers should provide the following information, as available: (1) the date and time of the incident; (2) the geographic area affected; (3) the number of voice grade equivalent circuits affected or the number of customers affected; (4) the types of services affected (*e.g.*, interexchange, local, cellular, 911 emergency services); (5) the duration of the incident; (6) the estimated number of lost erlangs during the incident;[2] (7) the apparent or known cause of the incident; (8) methods used to restore service; and (9) the steps taken to prevent recurrences of the outage. Thirty days after the incident, the carriers would be required to file with the Chief, Common Carrier Bureau, a Final Service Disruption Report, providing all available information on the incident, including any information not contained in their initial reports. This information generally is gathered by carriers after outage events, so providing it to the Commission should not be burdensome.

5. We request comment on all aspects of this proposal and the specific proposed rule set forth in Appendix A. Should the Commission require information of carriers other than those identified? Should carriers report events of shorter duration, for example 15 minutes, or which affect fewer circuits or customers? Should carriers report network incidents that, although they do not result in network outages, have significant reliability consequences? What threshold should be established for reporting such incidents? Should different information than that proposed be filed? Parties also should comment on whether, and how, outage information should be further disseminated. For example, outage information could be sent electronically to the state public utilities commission(s) in

[1] Policy and Rules Concerning Rates for Dominant Carriers, 6 FCC Rcd 2974 (1991), at Attachment C. In addition, in that proceeding, we required local exchange carriers subject to price cap regulation to file annual reports regarding infrastructure development.

[2] For purposes of the reports, commenters should assume an erlang represents one telephone call lasting one hour.

the state(s) where the outage(s) occurred. Notification also could be required to other telephone industry representatives. Evidence to date indicates that there is not widespread knowledge within the industry of outage incidents except where the incidents are publicized. Would such information sharing be useful? How should it occur? Commenters should include a full discussion of the reasons for any proposals.

6. This is a nonrestricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203 and 1.1206(a).

7. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendment is promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined in Section 601(3) of the Regulatory Flexibility Act. The Secretary shall send a copy of this Notice of Proposed Rulemaking, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

8. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before November 26, 1991, and reply comments on or before December 30, 1991. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting documents. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, Room 230, 1919 M Street, N.W., Washington, DC.

9. Accordingly, IT IS ORDERED THAT pursuant to Sections 1, 4, 201-205, 218, 220, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154, 201-205, 218, 220 and 403, NOTICE OF PROPOSED RULEMAKING is hereby provided to add Section 63.100 to the Commission's rules, 47 C.F.R. § 63.100, as indicated above and in Appendix A hereof.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

PROPOSED RULE

Part 63 of the Commission's Rules and Regulations (chapter 1 of Title 47 of the Code of Federal Regulations, Part 63) is proposed to be amended as follows:

1. The authority citation for Part 63 is proposed to be revised to read as follows:

Authority: Section 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201, 214, 218, 48 Stat. 1075, as amended.

2. The title of Part 63 is proposed to be revised to read as follows:

PART 63 - EXTENSION OF LINES AND DISCONTINUANCE, REDUCTION, DISRUPTION AND IMPAIRMENT OF SERVICE BY CARRIERS AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY STATUS

3. The table of contents for sections 63.60 - 63.90 is proposed to be amended by adding the word DISRUPTION and by adding section 63.100 to read as follows:

DISCONTINUANCE, REDUCTION, DISRUPTION AND IMPAIRMENT

* * * * *

63.100 Notification of service disruption.

4. The heading of sections 63.60 - 63.90 is proposed to be amended by adding the word DISRUPTION to read as follows:

DISCONTINUANCE, REDUCTION, DISRUPTION AND IMPAIRMENT

5. Section 63.100 is proposed to be added to Part 63 to read as follows:

DISCONTINUANCE, REDUCTION, DISRUPTION AND IMPAIRMENT

* * * * *

§ 63.100 NOTIFICATION OF SERVICE DISRUPTION.

Any facilities-based common carrier that provides access service or that provides interstate or international telephone service, that experiences a loss of telephone service to 50,000 or more of its customers or voice grade equivalent circuits, must notify the Commission when such service loss continues for 30 or more minutes. Notification must be served on the Commission's Monitoring Watch Officer, on duty 24 hours a day, by facsimile or other record means, delivered to Commission headquarters within 90 minutes of the commencement of the service outage. Notification shall identify a contact person who can provide further information, the telephone number at which the contact person can be reached, and what information is known at the time about the disruption including: (1) the date and time of the incident; (2) the geographic area affected; (3) the number of voice grade equivalent

circuits affected or the number of customers affected; (4) the types of services affected (e.g., interexchange, local, cellular, 911 emergency services); (5) the duration of the incident; (6) the estimated number of lost erlangs during the incident (an erlang representing one telephone call lasting one hour); (7) the apparent or known cause of the incident; (8) methods used to restore service; and (9) the steps taken to prevent recurrences of the outage. The report shall be captioned Initial Service Disruption Report. Thirty days after the service disruption, the carrier shall file with the Chief, Common Carrier Bureau, a Final Service Disruption Report, providing all available information on the incident, including any information not contained in its Initial Service Disruption Report.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-271

In the Matter of

Amendment of Section 73.202(b),	RM-7426
Table of Allotments,	RM-7580
FM Broadcast Stations.	RM-7666
(Brownstown, Cannelton, and	RM-7712
Edinburgh, Indiana; Beaver Dam,	
Campbellsville, Horse Cave and	
Munfordville, Kentucky; Carthage	
and Lafayette, Tennessee)	

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: September 6, 1991; Released: September 30, 1991

Comment Date: November 21, 1991
Reply Comment Date: December 6, 1991

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration are four separately filed petitions for rule making which are either mutually exclusive or related in some manner. Thus, they are considered in this consolidated *Notice* since they cannot all be accommodated separately in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules. The first petition was filed by William C. Potter ("Potter") (RM-7426) seeking the allotment of FM Channel 275A to Brownstown, Indiana, as that community's first local aural broadcast service. The second petition was filed on behalf of Hancock Communications, Inc. ("Hancock") (RM-7580), permittee of Station WKCM-FM, Channel 275A, Cannelton, Indiana, proposing the substitution of Channel 275C3 for Channel 275A at Cannelton, and modification of the permit for Station WKCM-FM accordingly. In order to accommodate the Cannelton proposal in conformity with Section 73.207(b) of the Commission's Rules, Hancock seeks two additional changes to the FM Table of Allotments. Hancock requests that the Commission substitute Channel 264A for Channel 274A at Beaver Dam, Kentucky, and modify the construction permit issued to Beaver Dam Broadcasting ("BDB") for proposed Station WVPV(FM) accordingly. Secondly, Hancock requests the substitution of Channel 294A for Channel 264A at Horse Cave, Kentucky, an allotment for which two applications are pending. [1] The third petition, filed by Mary L. Rothrock ("Rothrock") (RM-7666), seeks the allotment of FM Channel 275A to Edinburgh, Indiana, as that community's first local aural broadcast service. The fourth proposal, filed on behalf of Heartland Communications, Inc. ("Heartland"), [2] licensee of Station WCKQ(FM), Campbellsville, Kentucky, seeks the substitution of Channel 281C3 for Channel 281A,[3] and modification of its license to specify the higher powered channel (RM-7712). To accommodate its proposal, Heartland requests three additional changes as follows: substitute Channel 294A for Channel 272A at Munfordville, Kentucky, and modify the license for Station WLOC-FM; substitute Channel 281A for Channel 272A at Carthage, Tennessee, and modify the license for Station WUCZ(FM); and substitute Channel 272A for recently allotted Channel 281A at Lafayette, Tennessee. [4] Heartland stated its willingness to reimburse the licensees of Station WLOC-FM and Station WUCZ(FM) for their reasonable costs associated with the frequency changes. Each proponent stated an intention to apply for their requested channel, if allotted.

2. In support of its proposal, Potter states that adoption of the Brownstown proposal would provide that community (pop. 2704)[5] with its first local broadcast service. Rothcock asserts that an FM station at Edinburgh (pop. 4,779), [6] which she describes as a "growing" community, would provide a first local broadcast service to its residents.

3. Hancock submits that the requested modification of Station WKCM-FM at Cannelton could provide gain in service to an additional 36,813 people (a gain of 122%) in an area of 3,017 square kilometers (a gain of 169%). Furthermore, Hancock claims that if Channel 264A is substituted for Channel 274A at Beaver Dam, Kentucky, it would enable BDB to operate proposed Station WVPV(FM) with maximum Class A facilities, a benefit from which the community is presently precluded. Hancock adds that the Beaver Dam substitution would require BDB to relocate its transmitter site for proposed Station WVPV(FM). In recognition of the Commission's policy concerning the involuntary relocation of an authorized transmitter,[7] Hancock provided a copy of an agreement with BDB. Therein, BDB has consented to a change in its authorized transmitter site, as well as its proposed channel of operation, to accommodate the modification for Station

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[1] The applicants at Horse Cave are James B. Myers, III (File No. BPH-891012NI) and Royse Radio, Incorporated (File No. BPH-891011MB).

[2] Heartland filed this proposal in response to a *Notice of Proposed Rule Making* (MM Docket No. 89-570), 4 FCC Rcd 8589 (1989). The *Report and Order* in that proceeding, 6 FCC Rcd 3289 (1991), allotted Channel 281A to Lafayette, Tennessee, and advised Heartland that its modification proposal would be the subject of a separate rule making proceeding. Heartland has filed a petition for reconsideration of that action. Therefore, any action in the instant proceeding will be conditioned on the resolution of Heartland's petition for reconsideration.

[3] Heartland is presently operating on Channel 280A at Campbellsville. However, its license was modified to specify operation on Channel 281A in MM Docket No. 88-215. *See Second Report and Order*, 4 FCC Rcd 8749 (1989).

[4] *See* note 2, *supra*.

[5] Population figures reported herein were taken from the 1980 U.S. Census, unless otherwise indicated.

[6] Population figure reported for Edinburgh is the result of a special census count, according to the Rand McNally *Commercial Atlas and Marketing Guide* (1988 Ed.).

[7] *See Mt. Morris and Savanna, IL*, 5 FCC Rcd 2683 (1990); *Waupun, Mayville and New Holstein, WI*, 3 FCC Rcd 3163 (1988); *North Charleston, SC*, 51 RR 2d 25, 33 (1982).

WKCM-FM, provided it is reimbursed for all reasonable and prudent costs associated with the requested changes. Hancock advises that the Beaver Dam aspect of its proposal, in turn, requires the substitution of Channel 294A for vacant but applied for Channel 264A at Horse Cave, Kentucky. This substitution would also require the two pending applicants at Horse Cave to amend their applications to specify non-conflicting sites.

4. Heartland advocates that the allotment of Channel 281C3 at Campbellsville would enable it to expand its area of FM service to 87,242 persons in an area of 4,656 square kilometers, representing an increase in its present coverage to 50,608 persons in an area of 2,887 square kilometers. Moreover, Heartland states that the substitution of channels at Munfordville, Kentucky, and Carthage, Tennessee, will enable Station WLOC-FM and Station WUCZ(FM), respectively, to operate with maximum Class A facilities from their present transmitter sites, a benefit from which they are presently excluded. Heartland asserts that the substitution of Channel 272A at Lafayette, Tennessee, would likewise enable a broadcast station to operate thereon with maximum Class A facilities in lieu of the 3 kW limitation on present Channel 281A in that community.

5. As indicated earlier, a study of the proposals reveals that we cannot accommodate all four, as requested. The Brownstown proposal (Channel 275A) is mutually exclusive with Hancock's proposal to substitute Channel 275C3 for Channel 275A at Cannelton, Indiana. The communities are 124.1 kilometers (77 miles) apart whereas 142 kilometers (88 miles) is required between co-channel Class A and Class C3 allotments. The Brownstown proposal is also mutually exclusive with Rothrock's proposal to allot Channel 275A to Edinburgh, Indiana. The distance between the two communities is 44.5 kilometers (28 miles) whereas a distance of 115 kilometers (71 miles) is required between cochannel Class A allotments. The Cannelton and Edinburgh proposals are, however, compatible. Therefore, the Brownstown proposal must be comparatively considered with the Cannelton and Edinburgh proposals, unless alternate channels can be found.

6. The Cannelton, Indiana, and Campbellsville, Kentucky modification proposals are mutually exclusive with respect to the requested substitution of Channel 294A at Horse Cave, Kentucky, to accommodate the Cannelton proposal and the requested substitution of Channel 294A at Munfordville, Kentucky, to accommodate the Campbellsville proposal. The distance between Horse Cave and Munfordville is 8.0 kilometers (5 miles), whereas 115 kilometers (71 miles) is required between Class A co-channel allotments. Therefore, the Cannelton and Campbellsville proposals must be comparatively considered. However, the Campbellsville proposal is compatible with either the Brownstown or Edinburgh, Indiana, proposals.

7. In light of the above, two optional allotment plans will be considered. Under Option I, Channel 275A can be allotted either to Brownstown, as that community's first local aural broadcast service, in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, without the imposition of a site restriction,[8] or Channel 275A can be allotted to Edinburgh, Indiana, as that community's first local aural broadcast service, with a site restriction 15 kilometers (9.3 miles) southwest of the community,[9] to avoid short-spacing to Station WRIP(FM), Channel 276A, Versailles, Indiana, [10] and to Station WFXF-FM, Channel 277B, Indianapolis, Indiana. [11] Additionally, Option I proposes the substitution of Channel 281C3 for Channel 281A at Campbellsville, Kentucky at Heartland's specified site, located 15.5 kilometers (9.6 miles) north of the community. [12] Channel 294A will be proposed as a substitute for Channel 272A at Munfordville at the licensed site of Station WLOC-FM. [13] Channel 281A will be proposed as a substitute for Channel 272A at Carthage, Tennessee, at the licensed site of Station WUCZ(FM).[14] Channel 272A will be proposed as a substitute for Channel 281A at Lafayette, Tennessee, with a site restriction 6.1 kilometers (3.8 miles) northeast of the community., [15] Under Option II, Channel 275A can be allotted to Edinburgh, Indiana in compatibality with the requested substitution of Channel 275C3 for Channel 275A at Cannelton, Indiana, at Hancock's specified site, located 14.8 kilometers (9.2 miles) southeast of the community;[16] Channel 264A can be substituted for Channel 274A at Beaver Dam, Kentucky, at the suggested site specified for proposed Station WVPV(FM); [17] and Channel 294A can be substituted for Channel 264A at Horse Cave, Kentucky, at a site 6.4 kilometers (4.0 miles) northeast [18] which avoids a short-spacing to Channel 296C2 at Smiths Grove, Kentucky, as well as to the site specified in the application of Station WBLG(FM) at that community. [19]

8. In view of the mutual exclusivity discussed above, we shall provide the proponents an opportunity to demonstrate in comments why their community should be preferred. In this regard, the parties should be guided by the allotment criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), as follows:

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[8] Coordinates used for Channel 275A at Brownstown are 38-52-48 and 86-02-48.

[9] Coordinates used for Channel 275A at Edinburgh are 39-16-40 and 86-06-25.

[10] Coordinates at the licensed site of Station WRIP(FM), Channel 276A, Versailles, Indiana, are 39-10-38 and 85-17-00.

[11] Coordinates at the licensed site of Station WFXF-FM, Channel 277B, Indianapolis, Indiana, are 39-53-43 and 86-12-04.

[12] Coordinates used for Channel 281C3 at Campbellsville are 37-28-22 and 85-16-27.

[13] Coordinates used for Channel 294A at Munfordville, Kentucky, are 37-16-30 and 85-55-00.

[14] Coordinates used for Channel 281A at Carthage are 36-18-43 and 85-57-08.

[15] Coordinates used for Channel 272A at Lafayette are 36-33-10 and 85-58-09.

[16] Coordinates used for Channel 275C3 at Cannelton are 37-51-00 and 86-36-00.

[17] Coordinates used for Channel 264A at Beaver Dam, Kentucky, are 37-21-20 and 86-44-00.

[18] Coordinates used for Channel 294A at Horse Cave, Kentucky, are 37-13-26 and 85-51-46.

[19] Coordinates used for Channel 296C2 at Smiths Grove, Kentucky, are 36-50-10 and 86-16-40. Coordinates at the site specified in the application of Station WBLG(FM) for Channel 296C2 are 36-50-35 and 86-15-30. Although the proposed substitution at Horse Cave reflects a short-spacing to the present operation of Station WHHT(FM), Channel 294A, Cave City, Kentucky at coordinates 37-06-39 and 85-58-41, Station WHHT(FM) was moved to Channel 279A in MM Docket No. 88-215. *See* 4 FCC Rcd 8749 (1989).

(1) first fulltime aural service;

(2) second fulltime aural service;

(3) first local service;

(4) other public interest matters; [co-equal weight is given to priorities (2) and (3)].

Additionally, those parties seeking to upgrade their existing stations should submit a gain area study showing the population and square kilometers of the increased area to be served. *See Greenup, Kentucky and Athens, Ohio*, 6 FCC Rcd 1493 (1991), for the methodology to be applied to the studies.

9. As indicated above, since the Cannelton, Indiana, and Campbellsville, Kentucky, modification proposals herein seek upgrades on co-channels, we will optionally propose to modify the construction permit of Station WKCM-FM, Cannelton, Indiana, and the license of Station WCKQ-FM, Campbellsville, Kentucky, pursuant to the provisions of Section 1.420(g) of the Commission's Rules, without entertaining other expressions of interest or requiring the parties to demonstrate the availability of an additional equivalent channel for use by any such interested parties. Additionally, we shall optionally propose to modify the construction issued to Station WVPV(FM), Beaver Dam, Kentucky to accommodate the Cannelton, Indiana, proposal and to modify the licenses issued to Station WLOC-FM, Munfordville, Kentucky and Station WUCZ(FM), Carthage, Tennessee, to accommodate the Campbellsville, Kentucky proposal.

10. Whenever an existing licensee or permittee is ordered to change frequencies in order to accommodate a new channel allotment, Commission policy requires the benefitting party to reimburse the affected station for costs incurred therewith. In this instance, Hancock stated its willingness to reimburse Station WVPV(FM), Beaver Dam, Kentucky, for its reasonable costs associated with relocating its transmitter and moving to proposed Channel 264A, to accommodate the Cannelton, Indiana, proposal. Heartland has also stated its willingness to reimburse Station WLOC-FM, Munfordville, Kentucky, and Station WUCZ(FM), Carthage, Tennessee, for their reasonable costs connected with relocating to Channel 294A and Channel 281A, respectively, to accommodate the Campbellsville, Kentucky proposal.

11. Although an *Order to Show Cause* to BDB for proposed Station WVPV(FM) is not required in view of its consent to Hancock's modification request, we will serve it with a copy of this *Notice*. We will also serve a copy of this *Notice* on the applicants for Channel 264A at Horse Cave, Kentucky. In the event this proceeding is finalized prior to the issuance of a permit for Channel 264A at Horse Cave, Kentucky, the applicants may amend their applications accordingly. This may be accomplished without loss of "cut-off" status since the channels are of an equivalent class. *See Salmanca, NY and Bradford, PA*, 50 FR 26208 (1985), and *Sanibel, FL*, 50 FR 32706 (1985). Stations WLOC-FM, Munfordville, Kentucky, and Station WUCZ(FM), Carthage, Tennessee, will be served with an *Order to Show Cause* since Heartland has not indicated their consent to change frequencies to accommodate the Campbellsville modification proposal.

12. In view of the above, the Commission believes it is appropriate to solicit comments on the optional proposals to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

OPTION I

	Channel No.	
City	Present	Proposed
Brownstown, Indiana	--	275A
	or	
Edinburgh, Indiana	--	275A
	and	
Campbellsville, Kentucky	260A, 281A	260A, 281C3
Munfordville, Kentucky	272A	294A
Carthage, Tennessee	272A	281A
Lafayette, Tennessee	281A	272A

OPTION II

Edinburgh, Indiana	--	275A
Cannelton, Indiana	275A	275C3
Beaver Dam, Kentucky	274A	264A
Horse Cave, Kentucky	264A	294A

13. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, South Central Kentucky Broadcasting ("South Central"), licensee of Station WLOC-FM, Channel 272A, Munfordville, Kentucky, and Wood Broadcasting, Inc. ("Wood Broadcasting"), licensee of Station WUCZ(FM), Channel 272A, Carthage, Tennessee, SHALL SHOW CAUSE why their licenses should not be modified to specify operation on Channels 294A and 281A, respectively, as proposed herein, in lieu of their present authorization on Channel 272A at each community.

14. Pursuant to Section 1.87 of the Commission's Rules, South Central and Wood Broadcasting may, not later than **November 21, 1991,** file written statements showing with particularity why their licenses should not be modified as proposed in the *Order to Show Cause*. The Commission may call on South Central and/or Wood Broadcasting to furnish additional information. If South Central and/or Wood Broadcasting raise a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, South Central and/or Wood Broadcasting will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modifications are ultimately found to be in the public interest.

15. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the following: Beaver Dam Broadcasting, P.O. Box 130, Morgantown, Kentucky 42261, James B. Myers, III, P.O.

Box 312, Cave City, Kentucky 42127, and Royse Radio, Incorporated, P.O. Box 628, Glasgow, Kentucky 42142 (applicants for Channel 264A at Horse Cave, Kentucky); and to South Central Kentucky Broadcasting, Radio Station WLOC-FM, P.O. Box 307, Munfordville, Kentucky 42765; and Wood Broadcasting, Inc., Radio Station WUCZ(FM), P.O. Box 179, Carthage, Tennessee 37030.

16. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

17. Interested parties may file comments on or before **November 21, 1991,** and reply comments on or before **December 6, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioners or their counsel, as follows:

William C. Potter
R. R. #2, Box 442
Madison, IN 47250
(Petitioner - Brownstown, IN)

John F. Garziglia, Esq.
Pepper & Corazzini
1776 K Street, N.W.
Suite 200
Washington, D.C. 20006
(Counsel for Hancock Communications, Inc.)

Mary L. Rothrock
290 Harrison Drive
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(Petitioner - Edinburgh, IN)

John Wells King, Esq.
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Suite 600, 2000 M Street, N.W.
Washington, D.C. 20036
(Counsel for Heartland Communications, Inc.)

18. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

19. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-547

In the Matter of

Amendment of Section 73.202(b),	
Table of Allotments,	RM-7477
FM Broadcast Stations.	RM-7683
(Claude and Dimmitt,[1] Texas)	

ORDER TO SHOW CAUSE

Adopted: September 9, 1991; Released: September 30, 1991

Comment Date: November 21, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission issued the *Notice of Propose Rule Making* in this proceeding, 5 FCC Rcd 6729 (1990), in response to a petition filed by Lucille Anne Lacy ("Lacy") proposing the substitution of Channel 239C3 for Channel 239A at Claude, Texas, and the modification of her construction permit (BPH-900108NZ) accordingly. Lacy filed initial, reply, and supplemental comments as well as a counterproposal. [2]

2. Lacy's counterproposal requests the substitution of Channel 239C1 for Channel 239A at Claude, Texas, and modification of her construction permit to specify operation on Channel 239C1, in order to provide Claude with a wide coverage area FM service. In order to accommodate this proposal, Lacy also requests the substitution of Channel 263C3 for Channel 240C3 at Dimmitt, Texas, and the modification of the construction permit for Station KDIU(FM), Dimmitt, accordingly. [3]

3. In order to proceed with the proposal in this proceeding, it is necessary to issue an Order to Show Cause to Station KDIU, Channel 240C3, Dimmitt, Texas, why their construction permit should not be modified to specify operation on a different Class C3 channel. To avoid a conflict with the proposed upgrade at Claude, Texas, we shall propose the substitution of Channel 263C3 for Channel 240C3 at Dimmitt, Texas, as follows:

Community	Delete	Add
Dimmitt, Texas	240C3	263C3

4. Lacy has acknowledged a responsibility to reimburse the permittee of Station KDIU(FM) for the reasonable expenses incurred in changing to another Class C3 channel. A staff analysis confirms that Channel 263C3 can be allotted to Dimmitt at the site specified in KDIU(FM)'s construction permit. [4]

5. The Commission has made a preliminary determination that the public interest would be advanced by substituting Channel 239C1 for Channel 239A at Claude and by substituting Channel 263C3 for Channel 240C3 at Dimmitt to accommodate the Claude substitution. A final determination regarding this amendment to the Table must await the outcome of this Show Cause Order concerning the construction permit modification of Station KDIU(FM), Dimmitt, Texas, as discussed herein. Although Station KDIU(FM) is provided an opportunity to object to the ordered channel change, this Order does not afford additional opportunity either to comment on the merits of the conflicting proposals or for the acceptance of additional counterproposals.

6. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Collins Communications Company, permittee of Station KDIU(FM), Dimmitt, Texas, SHALL SHOW CAUSE why its construction permit SHOULD NOT BE MODIFIED to specify operation on Channel 263C3 as proposed herein instead of the present Channel 240C3.

7. Pursuant to Section 1.87 of the Commission's Rules, Collins Communications may, not later than **November 21, 1991,** file a written statement showing with particularity why its permit should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Collins Communications to furnish additional information. If Collins Communications raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Collins Communications will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

8. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Order to Show Cause* to

Collins Communications Company
P.O. Box 608
Dimmitt, Texas 79077

9. A copy of any comments filed by Collins Communications in this proceeding should be served on the following party:

[1] The community of Dimmitt has been added to the caption.
[2] Public Notice of the counterproposal was given March 27, 1991, Report No. 1842.
[3] Lacy also requested the allotment of Channel 259A instead of Channel 241A to Amarillo, Texas, as proposed in MM Docket No. 90-537. Channel 259A has been allotted to Amarillo. *See Report and Order*, 6 FCC Rcd 4729 (1991).
[4] The coordinates for Channel 263C3 at Dimmitt are North Latitude 34-35-11 and West Longitude 102-18-35.

Peter D. Shields
Gardner, Carton & Douglas
1001 Pennsylvania Avenue, N.W.
Suite 750-N
Washington, D.C. 20004
(Counsel for Lucille Ann Lacy)

10. The Commission has determined that the relevant provision of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments. Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504, and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not bee served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-272

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments, RM-7326
FM Broadcast Stations.
(Trinity, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 10, 1991 Released: September 30, 1991

Comment Date: November 21, 1991
Reply Comment Date: December 6, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Roy E. Henderson, d/b/a Trinity Broadcasting Company ("petitioner"), requesting the allotment of Channel 235A to Trinity, Texas, as the community's first local FM service. Petitioner states that he will apply for the channel, if allotted.

2. Petitioner states that Trinity is an incorporated community listed in the U.S. Census with a population of 2,620 persons, thus qualifying it as a "community" for commission allotment purposes. In addition, petitioner notes that Trinity is located in Trinity County, which has a projected population of 11,000 persons.

3. While petitioner requested the allotment of Channel 235A to Trinity, an engineering analysis indicates that the proposed allotment conflicts with a proposal requesting the substitution of Channel 236C2 for Channel 236A at Caldwell, Texas. [1] In an effort to resolve the technical conflicts between the two proposals, the staff has performed an engineering analysis to determine the availability of any alternate channels for use at Trinity. Our study shows that Channel 251A can be allotted to Trinity in lieu of Channel 235A, thereby eliminating any conflict with the Caldwell, Texas, proceeding.

4. We believe the public interest would be served by proposing the allotment of Channel 251A to Trinity, Texas, since it could provide the community with first local FM service. Channel 251A can be allotted to Trinity in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.5 kilometers (7.8 miles) north to avoid a shortspacing to Station KBXX(FM), Channel 250C, Houston, Texas. [2]

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Trinity, Texas	--	251A

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **November 21, 1991,** and reply comments on or before **December 6, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Roy E. Henderson
839 Timber Cove
Seabrook, Texas 77586
(Petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

[1] *See Notice of Proposed Rule Making,* 6 FCC Rcd 1551 (1991), adopted March 6, 1991.

[2] The coordinates for Channel 251A at Trinity are North Latitude 31-03-33 and West Longitude 95-21-48.

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-57

In the Matter of

Amendment of Section 73.202(b), RM-7601
Table of Allotments,
FM Broadcast Stations.
(New Iberia and Ville Platte
Louisiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 12, 1991 Released: September 30, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of D.C. Jones ("petitioner"), permittee of Station KKZN(FM), Channel 229C2, New Iberia, Louisiana, the Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause*, 6 FCC Rcd 1548 (1991), proposing the substitution of Channel 229C1 for Channel 229C2 at New Iberia and modification of her construction permit to specify operation on the higher powered channel. To accommodate the upgrade at New Iberia, an *Order to Show Cause* was issued to Ville Platte Broadcasting Company, Inc. ("Ville Platte Broadcasting"), as to why its license for Station KVPI(FM) should not be modified to specify operation on Channel 223A in lieu of its present Channel 228A at Ville Platte, Louisiana. Petitioner filed comments reiterating her intention to apply for Channel 229C1, if allotted to New Iberia. No other comments were received.

2. We believe the public interest will be served by substituting Channel 229C1 for Channel 229C2 at New Iberia, Louisiana, and by substituting Channel 223A for Channel 228A at Ville Platte, since it would provide New Iberia with an expanded coverage area FM service. Channel 229C1 can be allotted to New Iberia in compliance with the Commission's minimum distance separation requirements with a site restriction of 45.3 kilometers (28.1 miles) northeast to accommodate petitioner's desired site. Channel 223A can be allotted to Ville Platte in compliance with the Commission's minimum distance separation requirements and can be used at Station KVPI(FM)'s license site. [1] We recognize that the allotment of Channel 223A to Ville Platte conflicts with the presently licensed operation of Station KJEF(FM), Channel 224A, Jennings, Louisiana. However, on September 10, 1991, Station KJEF(FM)'s application for license to cover its construction permit (BPH - 890221IC) on Channel 225C2 was granted, thereby eliminating any conflict with this proceeding.

3. Ville Platte Broadcasting filed no response to the *Order to Show Cause* as to why its license should not be modified to specify operation on Channel 223A in lieu of Channel 228A. Accordingly, pursuant to Section 1.87 of the Commission's Rules, Ville Platte Broadcasting is deemed to have consented to the proposed modification.

4. Commission policy requires reimbursement to affected stations for the reasonable costs associated with changing frequencies. *See Circleville and Columbus, Ohio*, 8 FCC Rcd 159 (1967). Petitioner has stated her intention to reimburse Ville Platte Broadcasting for all reasonable expenses incurred in changing its frequency to Channel 223A.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 14, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
New Iberia, Louisiana	229C1, 256C
Ville Platte, Louisiana	223A

6. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of D.C. Jones for Station KKZN(FM), New Iberia, Louisiana, IS MODIFIED to specify operation on Channel 229C1, in lieu of Channel 229C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Ville Platte Broadcasting Company, Inc. (BLH-3522), for Station KVPI(FM), Ville Platte, Louisiana, IS MODIFIED to specify operation on Channel 223A in lieu of Channel 228A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in Station KVPI(FM)'s license, BLH-3522, except the channel as specified above. Any other changes, except those so specified

[1] The coordinates for Channel 229C1 at New Iberia are North Latitude 30-20-00 and West Longitude 91-32-00. The coordinates for Channel 223A at Ville Platte are North Latitude 30-41-39 and West Longitude 92-18-46.

under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-3522, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

8. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee of Station KVPI(FM), Ville Platte, Louisiana, as follows: Ville Platte Broadcasting Company, Inc., P.O. J, Ville Platte, Louisiana, 70586.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-569

In the Matter of

Amendment of Section 73.202(b),	RM-7510
Table of Allotments,	RM-7634
FM Broadcast Stations.	RM-7635
(Gluckstadt, Collins, Shubuta, and Sumrall, Mississippi)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 12, 1991 Released: September 30, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making and Order to Show Cause*, 5 FCC Rcd 6974 (1990), issued in response to a petition filed by Exchequer Communications, Inc. ("petitioner"), requesting the substitution of Channel 269C3 for Channel 269A, Gluckstadt, Mississippi, and the modification of its license for Station WLIN to specify operation on Channel 269C3 in lieu of Channel 269A. To accommodate the upgrade at Gluckstadt, an *Order to Show Cause* was issued to Southern Air Communications, Inc. ("Southern Air"), the licensee of Station WKNZ, Collins, Mississippi, proposing to change its Channel from 269A to 296A. [2] Petitioner filed comments reaffirming its interest in Channel 269C3 at Gluckstadt,[3] and Southern Air filed comments. Counterproposals were filed by WHP Broadcasting ("WHP") (RM-7634) and Sherrie Lynne Wolverton d/b/a Lamar County Broadcasting Company ("Lamar County") (RM-7635).[4] WHP filed reply comments. Petitioner filed untimely reply comments and a motion to accept late filed comments. [5] After the close of the comment period, petitioner and WHP filed a joint request for approval of settlement agreement and a supplement to the agreement.[6]

2. As indicated in the *Notice*, Channel 269C3 could provide Gluckstadt, Mississippi, with its first wide coverage area channel provided Channel 296A is substituted for Channel 269A, Collins, Mississippi. The proposed substitution at Collins can be accomplished using the current site for Station WKNZ. Southern Air supports the substitution proposal for Collins provided it is reimbursed for expenses incurred in changing channels. Southern Air states that it will file a minor modification application for Station WKNZ and promptly operate on the new channel once its application is granted.

3. WHP counterproposed the allotment of Channel 296C3 to Shubuta, Mississippi, as that community's first local service in lieu of petitioner's proposal. WHP submits that Shubuta currently has no AM or FM transmission services and, as a result, residents have no source for local news and must rely on broadcast stations in other cities for news and entertainment. WHP states that it will file an application for Channel 296C3 at Shubuta, if allotted.

4. A counterproposal filed by Lamar County requests the allotment of Channel 296A to Sumrall, Mississippi, as that community's first local service. Lamar County provides information in support of the proposal and indicates that it will file an application for a channel at Sumrall, if allotted.

5. On August 8, 1991, petitioner and WHP filed a joint settlement agreement looking toward resolution of this proceeding. Pursuant to that agreement, WHP is withdrawing its counterproposal to allot Channel 296C3 to Shubuta, Mississippi. In accordance with Section 1.420(j) of the Commission's Rules, WHP states that it will not receive compensation in excess of its legitimate and prudent expenses in exchange for the withdrawal and submits an itemized statement of expenses incurred in filing the counterproposal for Shubuta.

6. The withdrawal of WHP's counterproposal removes the conflict between the Gluckstadt and Shubuta proposals. A staff engineering analysis has determined that Channel 247A can be allotted to Sumrall in response to the counterproposal requesting a Class A channel for that community. In view of the withdrawal of the Shubuta counterproposal and the availability of an alternate channel for Sumrall, a comparative analysis of the remaining proposals is unnecessary.

7. Based on the above information, we believe the public interest would be served by the substitution of Channel 269C3 for Channel 269A at Gluckstadt, Mississippi, and modification of the license for Station WLIN to specify operation on Channel 269C3. Channel 269C3 can be allotted to Gluckstadt in compliance with the spacing requirements at petitioner's specified site. [7] We have authorized a modification of the license for Station WLIN to specify operation on Channel 269C3 in accordance with Section 1.420(g) of the Commission's Rules. To accommodate Channel 269C3 at Gluckstadt it is necessary to substitute Channel 296A for Channel 269A at

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[1] The communities of Shubuta and Sumrall have been added to the caption.

[2] The assignment of license for Station WKNZ, Collins, from Covington County Broadcasters, Inc., to Southern Air was granted by the Commission on November 22, 1989, and consummated on November 27, 1989 (BALH-891002GW).

[3] An assignment of license for Station WLIN, Gluckstadt, from Exchequer Communications to Aileron Communications, Inc., was granted by the Commission on October 24, 1990 (BAL-901009GJ and BALH-901009GK). We note that William Neville, III, is the controlling owner of both Exchequer Communications and Aileron Communications.

[4] Public notice of the counterproposals was given on February 15, 1991, Report No. 1838.

[5] Petitioner claims it inadvertently missed the filing deadline for reply comments. WHP filed a motion to strike petitioner's comments and petitioner opposed WHP's motion. The Commission disfavors acceptance of late filed comments. *See* Commission Rule 1.415. In any event, the filing of the settlement agreement obviates the need to consider petitioner's reply comments.

[6] Because this agreement resolves conflicting issues in this case, we believe acceptance is in the public interest.

[7] The coordinates for Channel 269C3 at Gluckstadt are 32-25-36 and 90-12-19.

Collins, Mississippi. The substitution can be accomplished at the existing site for Station WKNZ. [8] Petitioner has stated its willingness to reimburse the licensee of Station WKNZ for the reasonable costs in changing its frequency. In response to the counterproposal filed by Lamar County, we shall allot Channel 247A to Sumrall as that community's first local FM broadcast service. Channel 247A can be allotted to Sumrall with a site restriction 4.5 kilometers (2.8 miles) south of the community. [9] The site restriction will prevent a short spacing to Station WFFF-FM, Channel 244A, Columbia, Mississippi, and Station WOKK, Channel 246C1, Meridian, Mississippi.

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 14, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
Gluckstadt, Mississippi	269C3
Collins, Mississippi	296A
Sumrall, Mississippi	247A

9. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Aileron Communications, Inc., for Station WLIN, Gluckstadt, Mississippi, IS MODIFIED to specify operation on Channel 269C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, and Section 0.283 of the Commission's Rules, the license of Southern Air Communications for Station WKNZ, Collins, Mississippi, IS MODIFIED to specify operation on Channel 296A in lieu of Channel 269A, subject to the following conditions:

(a) Nothing contained herein shall be construed to authorize any change in BLH-881202KC for the channel specified above. Any other changes, except for those specified under Section 73.1690 of the Rules, requires prior authorization for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED that transmission facilities comply in all respects with license BLH-881202KC except for the channel as specified above and a license application is filed within 10 days of the commencement of program tests.

11. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Aileron Communications, Inc., licensee of Station WLIN, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

12. IT IS FURTHER ORDERED, That the counterproposal filed by WHP Broadcasting IS DISMISSED (RM-7634).

13. The window period for filing applications for Channel 247A at Sumrall, Mississippi, will open on **November 15, 1991,** and close on **December 16, 1991**.

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

15. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[8] The coordinates for Channel 296A at Collins are 31-31-49 and 89-30-29.

[9] The coordinates for Channel 247A at Sumrall are 31-22-29 and 89-32-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-174

In the Matter of

Amendment of Section 73.202(b),	RM-7055
Table of Allotments,	RM-7115
FM Broadcast Stations.	
(El Rio and Ojai, California)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 17, 1991 Released: September 30, 1991

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making* ("NPRM") in this proceeding, 5 FCC Rcd 1996 (1990), in which two mutually exclusive allotments were proposed. Susan M. Ciborosky ("Ciborosky") seeks the allotment of Channel 279A to El Rio, California, as that community's first local broadcast service. Eric R. Hilding ("Hilding") requests that Channel 279A be allotted to Ojai, California, as that community's second local FM service. Ciborosky, Miklos Benedek, Magic Broadcasting Company, and Hilding filed comments. Hilding was the only party to file reply comments.

2. Ciborosky states that her proposal to allot Channel 279A to El Rio should be given preference under priority (3) of *Revision of FM Policies and Procedures* [1] because the allotment of that channel to El Rio would provide that community its first local broadcast facility. She indicates that although the populations of the two communities are comparable,[2] El Rio has no local service but Ojai has a first local service in operation, Station KMXY(FM). Ciborosky concludes that the allotment of Channel 279A to Ojai cannot satisfy any of the Commission's allotment priorities. Ciborosky also reaffirms her interest in applying for and constructing a station if Channel 279A is allotted at El Rio.

3. In his comments, Hilding questions whether El Rio is a community for allotment purposes. In support of this position, Hilding alleges that El Rio is an unincorporated area within Ventura County, which is primarily a residential suburb of Oxnard, California. Hilding also contends that since the 1980 Census, the area known as El Rio has decreased by 30 per cent due to an alleged "annexation" by the City of Oxnard. Hilding asserts that on January 1, 1989, the Ventura County Monitoring System estimated the unincorporated area of El Rio's population to be 4,346. Hilding contends that continued annexation is likely, which in turn raises a question as to the future existence of El Rio even as an unincorporated area within Ventura County. Under these circumstances, Hilding believes that the allotment of Channel 279A to El Rio would result in nothing more than a sixth FM service for Oxnard and a ninth FM service for the Oxnard/Ventura metropolitan area, and that Ciborosky is not therefore entitled to a first local service preference under priority (3). On the contrary, Hilding submits that the case should be resolved under priority (4), other public interest considerations.

4. With respect to priority (4), Hilding argues that it would further the public interest to allot Channel 279A to Ojai rather than El Rio because of Ojai's geographic isolation and its need for a second broadcast facility. Hilding alleges that El Rio's broadcast reception services are all licensed in or near the Oxnard/Ventura area which contains El Rio. Hilding contends that despite the proximity of Ojai to El Rio, Ojai is shielded from the broadcast services available to El Rio by an intervening mountain range which has elevations up to 2,000 feet, and that therefore Ojai receives service only from its own local station. Hilding submits that, to compensate for these geographical conditions, a second service in Ojai is needed to provide an alternative station during public emergencies such as fires and earthquakes. Hilding adds that since Ojai and the surrounding area are noted for tourism, an additional broadcast facility would further serve the public interest by providing public service announcements to direct tourists to points of interest.

5. Miklos Benedek filed comments expressing an interest in applying for a construction permit for Channel 279A if it is allotted to El Rio. He therefore encourages the Commission to rule in favor of the El Rio allotment.

6. Magic Broadcasting Corporation, Inc. ("Magic"), licensee of Station KMGQ-FM, Goleta, California, supports the allotment of Channel 279A to El Rio for two reasons. First, it believes El Rio should be preferred because it alone satisfies allotment priority (3). Second, it rejects Hilding's argument that El Rio does not qualify as a community. Magic contends that Hilding has presented no evidence to suggest that El Rio lacks the characteristics of a community.

7. In reply comments, Hilding again questions El Rio's status as a community in light of its eventual annexation by the city of Oxnard. He states that the annexation process is already underway and that "the City of Oxnard General Plan calls for the area known as El Rio to become part of Oxnard through annexation."

8. After carefully reviewing the record in this proceeding, we believe that the public interest would best be served by allotting Channel 279A to El Rio. First, we find that El Rio is a community for allotment purposes. Generally, we presume community status if a community is incorporated or listed in the U.S. Census. In this instance, Ciborosky's original petition for rule making stated that El Rio was incorporated and listed in the U.S. Census with a population of 6,173 persons. Although we determined that El Rio is not incorporated, we confirmed that it is listed in the U.S. Census and, therefore, did not raise

[1] 90 FCC 2d 88, 91 (1982). The criteria for determining the comparative preferability of a proposed FM allotment are (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters. Co-equal weight is given to priorities (2) and (3).

[2] El Rio has a population of 6,173; Ojai, a population of 6,816. The data are taken from the 1980 U.S. Census.

a community issue in the *Notice* in this proceeding. [3] El Rio is still entitled to this presumption of community status unless the presumption has been rebutted. While Hilding alleges that 30% of El Rio's area has been annexed by the city of Oxnard and the remainder of El Rio will be annexed, no documentation has been submitted to support these allegations or to indicate when future annexation would occur. [4] Moreover, no allegations have been made that El Rio lacks other indicia of community status. Under these circumstances, we believe that El Rio is a community for allotment purposes.

9. Second, since the parties were requested by the *Notice* to determine if alternate channels may be available for allotment to Ojai or El Rio and since no such showings were made, we must use the criteria established in *Revision of FM Assignment Policies and Procedures* [5] to decide whether Channel 279A should be allotted to El Rio or Ojai. Using this criteria, we note that El Rio is entitled to a first local service preference under priority (3) because it has no local radio station whereas Ojai already has one local FM station. Therefore, Channel 279A will be allotted to El Rio. [6]

10. A staff engineering analysis confirms that Channel 279A can be allotted to El Rio in compliance with the Commission's minimum distance separation requirements. [7] Since El Rio is located within 320 kilometers (199 miles) of the Mexican border, concurrence of the Mexican government has been obtained.

11. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, that effective **November 14, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
El Rio, California	279A

12. The window period for filing applications for Channel 279A at El Rio will open on **November 15, 1991,** and close on **December 16, 1991.**

13. IT IS FURTHER ORDERED, That the petition for rule making of Eric R. Hilding to allot Channel 279A to Ojai, California (RM7115) IS DENIED.

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

15. For further information concerning this proceeding, contact Belford V. Lawson, III, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[3] *See 1988 Rand McNally Commercial Atlas* at 268.

[4] Although Hilding claims that his allegations regarding the annexation of El Rio can be verified by contacting the city of Oxnard, the burden is on the party rebutting the presumption of community status to present such information to the Commission.

[5] *See supra* note 1.

[6] Hilding also seeks to raise what appears to be a quiet village issue by claiming that Ojai has a greater need for a second local FM service than El Rio has for a first local service. We do not agree. While Hilding has shown that a need may exist for a second local FM service at Ojai due to its isolated location, he has not shown that El Rio does not need a first local aural service. Although he claims that the residents of El Rio already receive nine radio signals, this does not undercut their need for a first local service because it is well established that a reception service is not a substitute for a local transmission service. *See, e.g., Bartow, Georgia,* 4 FCC Rcd 6876, 6879 (1989), *recon. dismissed,* 5 FCC Rcd 442 (1990). Furthermore, quiet village issues have only been applicable to communities with populations under 1,000. Since the population of El Rio is over 6,000 persons, a quiet village issue is not appropriate.

[7] The coordinates for Channel 279A at El Rio are 34-14-33 and 119-12-17. Since the petition resulting in this allotment was filed prior to October 2, 1989, applicants for Channel 279A at El Rio may avail themselves of the provisions of Section 73.213(c) with respect to Station KOST(FM), Channel 278B, Los Angeles, California.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

C-TEC CABLE SYSTEMS
OF MICHIGAN, INC.
Complainant,

v. File No. E-90-115

PENINSULA TELEPHONE COMPANY,
Defendant.

ORDER

Adopted: September 23, 1991 Released: September 27, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On March 15, 1990, C-TEC Cable Systems of Michigan, Inc. ("C-TEC") filed the above-captioned formal complaint for injunctive and other relief alleging that Peninsula Telephone Company ("Peninsula") was indirectly engaged in the provision of video programming to subscribers in its telephone service area in violation of Section 533(b)(1) of the Communications Act, 47 U.S.C. § 533(b)(1) and Section 63.54 of the Commission's Rules, 47 C.F.R. § 63.54. On August 30, 1991, however, C-TEC filed a motion for leave to withdraw its complaint without prejudice, stating that formal proceedings before the Commission are no longer necessary at this time as a result of changes in Peninsula's plans to construct a cable television system. The motion is unopposed.

2. On the basis of the statements contained in C-TEC's unopposed motion, we conclude that the public interest would be served by granting the motion.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that C-TEC's Motion For Leave to Withdraw Complaint without prejudice IS GRANTED and that the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

QUINTO BROADCASTING CORPORATION — File No. BPH-870515NF

For Construction Permit
for a New FM Station on Channel 281A
in Tucson, AZ

MEMORANDUM OPINION AND ORDER

Adopted: September 20, 1991 Released: September 27, 1991

By the Commission:

1. The Commission has under consideration the application for review filed on September 30, 1988, by Quinto Broadcasting Corporation ("Quinto"). Quinto seeks reinstatement of the above-captioned application, which was dismissed on August 24, 1988, by the FM processing staff. For the reasons set forth below, we deny the Quinto application for review and hold that its application was properly dismissed pursuant to our FM "hard look" processing rules, *Processing of FM and TV Broadcast Applications*, 50 Fed. Reg. 19,936 (May 13, 1985) ("*FM Processing Order* "), because it failed timely to comply with the antenna height limits imposed by the *Agreement on Radio Broadcasting in the Standard Broadcast Band: Frequency Modulation Broadcasting in the 88 to 108 MHz Band*, Nov. 9, 1972, United States-Mexico, Art. 5, § A(6)(a), 24 U.S.T. 1815, 1830, T. I. A. S. No. 7697, at 16 ("U.S. - Mexico Agreement"). Our action herein is consistent with recent court precedent, *Malkan FM Associates v. FCC*, No. 90-1281 (D.C. Cir. June 14, 1991), *affirming Texas Media Group*, 5 FCC Rcd 2851 (1990).

BACKGROUND

2. On May 15, 1987, Quinto filed its application, which specified an effective radiated power ("ERP") of 3 kilowatts ("kW") at an antenna height above average terrain ("HAAT") of 100 meters ("m"). On June 22, 1987, the Commission released a Notice of Tenderability for the Quinto application. Subsequently, on August 27, 1987, Quinto filed an amendment proposing to reduce its ERP to 2.5 kW. On August 24, 1988, the FM processing staff returned Quinto's application because, although the proposed facilities were located within 320 kilometers of the Mexican border and therefore subject to the U.S. - Mexico Agreement, its original proposal did not comply with the antenna height limitations set forth in the Agreement of 3 kW ERP at 300 feet (equivalent to 91 m) HAAT. The staff also returned without consideration Quinto's amendment, because it was untimely and did not contain a showing of good cause for late filing. Quinto now seeks review of the staff's action, arguing that its application was not speculative, was carefully prepared and erroneously specified an ERP/HAAT combination of 3 kW at 100 m only because of an "ambiguity" created by treaty limits for power and height that differ from domestic limits. Moreover, Quinto notes that it filed a curative amendment before the Commission began processing its application. Quinto concludes that its curative amendment and its underlying application should have been accepted.

DISCUSSION

3. Initially, we note that the U.S. - Mexico agreement unambiguously specifies an antenna height limitation of 3 kW ERP at 300 feet. We reject Quinto's argument that its amendment should have been accepted and considered in evaluating the acceptability of its application. The Commission has previously held that:

> [C]ompliance with the ERP and HAAT limitations set forth in [the Agreement] is necessary to finding that an application is acceptable for filing. *See Kerr County*, 4 FCC Rcd 5021, 5022 (1989); *see also Domega Broadcasting Corp.*, 4 FCC Rcd 1450 (1989). It is also well established that amendments addressing the acceptability of an FM application are not permitted beyond expiration of the 30-day period triggered by a Public Notice announcing that the application has been accepted for tender, regardless of how minor or *de minimis* they are. *See* [*FM Processing*] Order, 50 Fed. Reg. at 19941.

Texas Media Group, 5 FCC Rcd at 2852. In affirming the Commission, the Court of Appeals held that the Commission's rules provided legally sufficient notice to applicants that "noncompliance with the antenna height limit in the U.S. - Mexico Agreement would cause return of an application as unacceptable" without a further opportunity to submit a curative amendment. *Malkan FM Associates*, slip op. at 12.

4. It is undisputed that Quinto's amendment of August 27, 1987 was filed after the expiration of the amendment-of-right period in July 1987. We cannot find good cause to accept its late-filed amendment. The Commission's rules provide adequate notice to all commercial FM applicants that, by the expiration of the amendment-of-right period, their applications must comply on their face with the U.S. - Mexico Agreement in order to be acceptable for filing. *Id.* Quinto's failure to do so demonstrates a lack of due diligence. Second, its noncompliance with the U.S. - Mexico Agreement cannot be fairly said to be involuntary, because the choice of ERP and HAAT parameters specified in the application obviously is within the control of the applicant and its agents. *Cf. United Public Broadcasting Co., Inc.*, 57 RR 2d 1605, 1606 (1985) (applicants are responsible for compliance with the rules and may not shift responsibility to others); *RDH Communications, Limited Partnership*, FCC 91-233, adopted July 19, 1991, at para. 5 (same). Finally, we note that a number of applicants for this allotment did comply with the treaty limits. Acceptance of Quinto's late-filed amendment would disrupt the orderly functioning of our processing system and would be unfairly prejudicial to those applicants in this case who have complied with the Commission's FM processing rules and the provisions of the U.S. - Mexico Agreement. *FM Processing Order*, 50 Fed. Reg. at 19941. In sum, Quinto's amendment fails the established test for "good cause" set forth in *Erwin*

O'Conner Broadcasting Co., Inc., 22 FCC 2d 140, 143 (Rev. Bd. 1970). *See PrimeMedia Broadcasting, Inc.*, 3 FCC Rcd 4293, 4294 (1988); *Donovan Burke*, 104 FCC 2d 843, 845-46 (1986). Therefore, we deny Quinto's application for review and affirm the staff's dismissal of Quinto's application and amendment.

5. ACCORDINGLY, IT IS ORDERED, That the Application for Review filed on September 30, 1988, by Quinto Broadcasting Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

PIKE FAMILY BROADCASTING, INC. File No. BPH-870330MT

G. DALE COWLE File No. BPH-870422MG

For Construction Permit
for a New FM Station on Channel 258A
in Rancho Mirage, California

MEMORANDUM OPINION AND ORDER

Adopted: September 20, 1991 Released: September 27, 1991

By the Commission:

1. The Commission has under consideration the application for review filed on February 13, 1990, by Pike Family Broadcasting, Inc. ("Pike") and the petition for reconsideration filed on March 9, 1990, by G. Dale Cowle ("Cowle").[1] They seek reinstatement of the above-captioned applications. The applications' dismissals were upheld in, or ordered by, the Hearing Designation Order in MM Docket No. 90-10, *Rancho Mirage Radio, A General Partnership*, 5 FCC Rcd 721, 721-22 (MM Bur. 1990) ("*HDO*") (designating seven other applications for comparative hearing). For the reasons set forth below, we deny the Pike application for review and the Cowle petition for reconsideration, and hold that their applications were properly dismissed pursuant to our FM "hard look" processing rules, *Processing of FM and TV Broadcast Applications*, 50 Fed. Reg. 19,936 (May 13, 1985) ("*FM Processing Order*"), because they failed to comply with the antenna height limits imposed by the *Agreement on Radio Broadcasting in the Standard Broadcast Band: Frequency Modulation Broadcasting in the 88 to 108 MHz Band*, Nov. 9, 1972, United States-Mexico, Art. 5, § A(6)(a), 24 U.S.T. 1815, 1830, T.I.A.S. No. 7697, at 16 ("U.S.- Mexico Agreement"). Our action herein is consistent with recent court precedent. *Malkan FM Associates v. FCC*, No. 90-1281 (D.C. Cir. June 14, 1991), *affirming Texas Media Group*, 5 FCC Rcd 2851 (1990).

BACKGROUND

2. On March 30, 1987, Pike filed its captioned application, which specified therein an effective radiated power ("ERP") of 3 kilowatts ("kW") at an antenna height above average terrain ("HAAT") of 100 meters ("m"). Similarly, on April 22, 1987, Cowle filed his application, which also specified 3 kW ERP at 100 m HAAT. On May 9, 1988, the FM processing staff returned each application because, although the proposed facilities were located within 320 kilometers of the Mexican border and therefore subject to the U.S. - Mexico Agreement, neither complied with the Agreement's antenna height limitations of 3 kW ERP at 300 feet (equivalent to 91 m) HAAT. Pike then filed, on May 19, 1988, a petition for reconsideration of the dismissal of its application and, on May 31, 1988, filed a petition for leave to amend its proposal to conform to the requirements of the Agreement. The *HDO* denied both Pike petitions. Pike now seeks review of that aspect of the *HDO*, arguing principally that the Commission failed to provide legally adequate notice that applications must comply with the antenna height limits specified in the Agreement in order to be acceptable for filing and that its curative amendment should have been accepted.

3. As for Cowle, on April 20, 1988, prior to the initial dismissal of his application, Cowle had filed an untimely petition for leave to amend his proposal to correct purported errors in the technical parameters specified in his application, including correcting his proposed HAAT to 77 meters. The corrected proposal complied with the U.S.-Mexico Agreement. On May 9, 1988, the FM processing staff dismissed Cowle's application. By letter of June 3, 1988, the FM processing staff accepted the amendment, rescinded its May 9, 1988, dismissal of the Cowle application, and reinstated the application *nunc pro tunc*. However, in response to a petition for reconsideration filed by Desert Sun Radio, Ltd., the Chief, Audio Services Division, held in the *HDO* that Cowle's amendment was untimely and, thus, did not cure his original violation of the Agreement. Cowle's application was dismissed as inadvertently accepted for filing. Cowle now seeks reconsideration of that *HDO* ruling. Cowle, like Pike, argues lack of notice of the Agreement and that his curative amendment should have been accepted for good cause and considered in evaluating compliance with the Agreement.

DISCUSSION

4. *Adequate Notice*. In recently denying review of the dismissal of other applications which violated the U.S. - Mexico Agreement, we rejected an argument, similar to Pike's and Cowle's, that we did not give proper notice of the HAAT and ERP restrictions contained in the Agreement. *Texas Media Group*, 5 FCC Rcd at 2851-52. We there explained:

> The Commission is not required to publish an international agreement or treaty in the Federal Register or incorporate such agreement or treaty into its rules before it can require applicants to comply with its terms. *See Kerr County Broadcasting*, 4 FCC Rcd 5021 (1989); *Cf. WBEN v. United States*, 396 F. 2d 601, 616 (9th Cir. 1968)...; 5 U.S.C. § 552.... As we pointed out in *Kerr County*, under the Constitu-

[1] Both pleadings were opposed by mutually exclusive applicants Desert Sun Radio, Ltd. and Sundial Radio Broadcasters, A California Limited Partnership. A third competing applicant, Drake Broadcasting, opposed the Cowle petition and also filed a motion to dismiss Pike's application for review; and a fourth applicant, Anne K. Wallace and William F. Wallace, opposed the Pike pleading only. Cowle filed a reply. Pike filed a reply to the Wallace opposition and opposed the Drake motion to dismiss; Drake filed a reply. In addition, Desert Sun filed a motion for extension of time. Cowle also filed a motion for stay which was opposed by Sundial and by Daniel P. Mitchell, another applicant.

> tion the Agreement takes precedence over the Commission's rules and the Commission has no power or authority to waive, modify or alter the terms thereof.... Among the general powers of the Commission enumerated in 47 U.S.C. § 303 is the power to make rules and regulations necessary to carry out the provisions of any international treaty. *See* 47 U.S.C. § 303(r). The Commission exercised this power in adopting and publishing in the Federal Register, 47 C.F.R. § 73.1650, which explicitly states that the U.S. is a signatory to an agreement with Mexico concerning FM Broadcast stations and indicates where that agreement may be inspected or how it may be obtained. *See* 43 Fed. Reg. 45842 (1978) (adopting § 73.1650). *See also* 47 C.F.R. § 73.204 ("International Agreements and other restrictions on use of channels") (cross-referencing § 73.1650), 49 Fed. Reg. 10264 (1984) (adopting § 73.204). In so doing, the Commission put all applicants on notice regarding the agreement. *Kerr County* at 5022. Further notice was provided in the *Report and Order* in MM Docket 80-90, 48 Fed. Reg. 29486, 29499 (1983) and the [*FM Processing*] Order, 50 Fed. Reg. at 19946 (Appendix D). The fact that the Agreement was not separately referenced in yet another provision of the Commission's rules (47 C.F.R. § 73.211) is irrelevant.

5 FCC Rcd at 2852. In affirming the Commission, the Court of Appeals did point out that our rules (§73.207(b)(3)) referred more clearly to the special requirements of the Agreement governing station separations than to the Agreement's limitations on antenna height. *Malkan FM Associates*, slip op. at 10. Nevertheless, the Court held:

> Based on the reference to the existence of the U.S. - Mexico Agreement in the Commission's general rules, *see* 47 C.F.R. § 73.211, and the explicit statement in the [*FM Processing Order*] that antenna height is "limited in certain cases by international treaty," 50 Fed. Reg. at 19,946,... the Commission did enough to put [applicants] on notice that the U.S. - Mexico Agreement should be consulted before filing.

Malkan, at 10.

5. Based on the court's decision, we reject Pike's and Cowle's challenges to the legal adequacy of notice of the requirements of the U.S. - Mexico Agreement.

6. *Amendments.* We also reject the argument of both Pike and Cowle that their untimely amendments seeking to cure non-compliance with the U.S. - Mexico Agreement should have been accepted and considered in evaluating the acceptability of their applications. The Commission has previously held that:

> [C]ompliance with the ERP and HAAT limitations set forth in [the Agreement] is necessary to finding that an application is acceptable for filing. *See Kerr County*, 4 FCC Rcd at 5022; *see also Domega Broadcasting Corp.*, 4 FCC Rcd 1450 (1989). It is also well established that amendments addressing the acceptability of an FM application are not permitted beyond expiration of the 30-day period triggered by a Public Notice announcing that the application has been accepted for tender, regardless of how minor or *de minimis* they are. *See* [*FM Processing*] Order, 50 Fed. Reg. at 19941.

Texas Media Group, 5 FCC Rcd at 2852. In affirming the Commission, the Court of Appeals held that the Commission's rules provided legally sufficient notice to applicants that "noncompliance with the antenna height limit in the U.S. - Mexico Agreement would cause return of an application as unacceptable" without a further opportunity to submit a curative amendment. *Malkan FM Associates*, slip op. at 12.

7. It is undisputed that both Cowle's amendment of April 20, 1988 and Pike's amendment of May 31, 1988 were filed after the expiration of the amendment-of-right period on June 29, 1987. Nevertheless, both applicants assert that their amendments should have been accepted for good cause. In particular, Cowle argues that his amendment did not substantively alter his engineering in that he adheres to his original proposal "to erect a structure 20 meters high on which he will side-mount an antenna with a radiation center at the 17-meter level." Cowle Pet. Recon. at 10. However, Cowle admits that he erroneously specified the HAAT as 100 meters, a misstatement he attributes to his consulting engineer's assumption that the average height of the pertinent terrain surrounding his proposed antenna tower was 697 meters, a figure given in the Commission's files for the adjacent tower of Station KPLM(FM), Palm Springs, California. *Id.* at 3, 21. According to Cowle, his proffered amendment reducing his proposed HAAT to 77 meters merely relied on the correct average terrain height of 720 meters, but made no alteration in his proposed power and radiation center above ground. Finally, he asserts that had the FM processing staff conducted its own engineering study, it would have discovered the error and could have determined the correct HAAT figure for Cowle. *Id.* at 18, 20.

8. We reject Cowle's contention that since the "real" average terrain height was 720 meters, not 697 meters, then the "real" height of the antenna above average terrain was 77 meters, not 100 meters, and was in compliance with the terms of the treaty. At the time that he filed his application, Cowle stated that the "real" height above mean sea level was 797 meters and he specified an antenna height above average terrain of 100 meters, not 91 meters as required by the treaty. He did not recognize and correct what he now argues was an error on his own part until after the amendment of right period had passed. We see no reason, assuming that Cowle is now correct, to reward what he maintains was the submission of erroneous data, data which remained inadequate until well after the amendment as of right period.

9. We also reject Cowle's argument that even though the amendment of right period had passed, his May 9, 1990, amendment was merely correcting erroneous data, not changing his proposed facilities, and should therefore have been accepted for good cause. The staff initially accepted the amendment for good cause, but upon the realization that the initial application violated the treaty and recognizing that amendments otherwise acceptable for good cause cannot be accepted if they correct a defect after the amendment of right period, the staff properly dismissed the application. *Cf. Prime Media Broadcasting, Inc.* 3 FCC Rcd 4293, 4294 (1988). As previously dis-

cussed, the Commission's rules provide adequate notice to all commercial FM applicants that, by the expiration of the amendment-of-right period, their applications must comply on their face with the U.S. - Mexico Agreement in order to be acceptable for filing. Cowle's failure to bring its application into compliance with the Agreement demonstrates a lack of due diligence. Second, his noncompliance with the U.S. - Mexico Agreement cannot be fairly said to be involuntary, because the choice of ERP and HAAT parameters specified in the application is within the control of the applicant and its agents. *Cf. United Public Broadcasting Co., Inc.*, 57 RR 2d 1605, 1606 (1985) (applicants are responsible for compliance with the rules and may not shift responsibility to others); *RDH Communications, Limited Partnership*, FCC 91-233, adopted July 19, 1991, at para. 5 (same). Finally, we note that a number of applicants for this allotment did comply with the treaty limits. Acceptance of Cowle's late-filed amendment would disrupt the orderly functioning of our processing system and would be unfairly prejudicial to those applicants in this case who have complied with the Commission's FM processing rules and the provisions of the U.S. - Mexico Agreement. *FM Processing Order*, 50 Fed. Reg. at 19941. In sum, Cowle's amendment fails the established test for "good cause" set forth in *Erwin O'Conner Broadcasting Co., Inc.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970). *See Prime Media Broadcasting, Inc.*, 3 FCC Rcd 4293, 4294 (1988); *Donovan Burke*, 104 FCC 2d 843, 845-46 (1986). Therefore, we deny Cowle's petition for leave to amend filed April 20, 1988, reject the amendment, affirm the *HDO* 's dismissal of the Cowle application as inadvertently accepted for filing, and deny Cowle's petition for reconsideration.

10. Cowle's also asserts that had the FM processing staff conducted its own engineering study, it would have discovered the error and could have determined the correct HAAT figure for Cowle. *Id.* at 18, 20. We see no reason why the staff should be required to correct errors by an applicant when the application does not, on its face, comply with our rules. Indeed, the "hard look" process was adopted precisely to remedy a situation in which applicants had come to expect such actions and as a result were submitting applications not prepared with sufficient care. Cowle's reliance on the Hearing Designation Orders in *Wayne L. Dilucente*, 5 FCC Rcd 1217 (MM Bur. 1990), and *Bitner-James Partnership*, 5 FCC Rcd 986, 988 (MM Bur. 1990), for the proposition that the Commission's FM engineering staff should have discovered Cowle's error and provided him an opportunity to correct it is also misplaced. The cited cases are distinguishable. In *Dilucente*, the FM processing staff was able to confidently and reliably determine the applicant's actual overall tower height from the four corners of the application, and the applicant had complied with all acceptability criteria. Here, in contrast, the error which Cowle alleges resulted in proposing 100 m HAAT could not be detected from the four corners of the application. Instead, as Cowle concedes (Pet. Recon. at 21), an engineering study based on the computer database he ultimately utilized would have been necessary to calculate the correct figure. Also, the *Bitner-James* case involved an application, already acceptable for filing, which was amended to change transmitter sites. Based on an engineering study, the staff returned the amendment pursuant to the "suicide" amendment rule, 47 C.F.R. § 73.3573(c), because it would have rendered the application unacceptable. *See Golden Shores Broadcasting, Inc.*, 2 FCC Rcd 4743, 4744 (1987). In contrast, Cowle's instant application was never acceptable for filing. Similarly, Cowle's reference (Pet. Recon. at 19-20) to the staff's treatment of the Sundial application, *HDO* at para. 7, is also misplaced. The Sundial application, unlike Cowle's, satisfied all tenderability and acceptability criteria, and the staff's engineering study detected only minor errors calling into question the ultimate grantability of the application.

11. For similar reasons, we affirm the dismissal of Pike's late-filed curative amendment, which proposed to decrease its effective radiated power in order to bring its unacceptable application into compliance with the U.S. - Mexico Agreement. The Pike application was properly dismissed.

12. ACCORDINGLY, IT IS ORDERED, That the Motion to Dismiss filed on February 27, 1990, by Drake Broadcasting IS DENIED,[2] and the Motion for Stay filed on March 13, 1990, by G. Dale Cowle IS DISMISSED as moot; and

13. IT IS FURTHER ORDERED, That the Application for Review filed on February 13, 1990, by Pike Family Broadcasting, Inc. and the Petition for Reconsideration filed on March 9, 1990, by G. Dale Cowle ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[2] We reject Drake Broadcasting's assertion that the rules do not permit Pike to file an application for review of the *HDO*'s dismissal of its application. Appeal of the dismissal properly lies either through the filing of a petition for reconsideration, pursuant to 47 C.F.R. § 1.106(a)(1), or an application for review, pursuant to § 1.115(a). The language in § 1.115(e)(3), to which Drake refers, limits only those applicants for review of Hearing Designation Orders who were set for hearing and wish to challenge some aspect of the designating order. As to dismissed applicants, such as Pike, the *HDO* is a final adverse ruling from which lies the right to lodge an immediate appeal.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re application of

NYNEX Mobile Services Company for authorization of a Public Coast Station to serve New York, New York — File No. 862060

MEMORANDUM OPINION AND ORDER

Adopted: September 20, 1991 Released: September 27, 1991

By the Chief, Private Radio Bureau:

I. INTRODUCTION

1. On June 15, 1989, the license held by NYNEX Mobile Services Company (NMSC) for a public coast station located in New York, New York, expired. Prior to the expiration of its license, NMSC was authorized to operate on three working frequencies. After obtaining special temporary authority to continue the operation of the station, NMSC filed an application to renew the license. Niagara Communications, Inc. (Niagara) filed a timely Petition to Deny NMSC's renewal application. For reasons discussed below, we will dismiss Niagara's Petition and grant NMSC's application.

II. DISCUSSION

2. In its Petition to Deny the renewal of NMSC's license, Niagara argues that because an expired public coast station license can not be renewed, the Commission should consider NMSC's application as one for a new station and limit NMSC to one working frequency. Pursuant to Section 80.371(c) of the Commission's Rules, 47 C.F.R. § 80.371(c), new licensees are limited to one working frequency until the applicant can demonstrate "heavy use" of the initial frequency assignment. Under Section 80.371(c),"heavy use" can be demonstrated by a factual showing that for any 4 days within a 10-consecutive-day period, the assigned frequency was used for exchanging communications at least 40 percent of the operating time. No more than half of that 40 percent time can be waiting or set-up time. Further, Section 80.371(c) requires that the selected 10-consecutive-day period must be from the 2 months immediately prior to the filing of the application. Niagara argues that because NMSC failed to supplement its initial application with such a showing, the Commission should deny NMSC's application to resume operation on three frequencies.

3. Following the timely filing of an Opposition by NMSC and a Reply by Niagara, the Chief of the Aviation and Marine Branch, Private Radio Bureau, acting under delegated authority, determined that NMSC's application was one for a new station and, therefore, only a single working frequency could be assigned. [1] This letter indicated, however, that if NMSC could demonstrate "heavy use" on the three working frequencies it had been assigned prior to the expiration of its license, the Commission would consider waiving the loading requirement and restrictions of Section 80.371(c).

4. On January 28, 1991, NMSC filed a supplemental application seeking to demonstrate "heavy use" and a Petition for a Waiver of the portion of Section 80.371(c) that requires that a "heavy use" showing be taken from the two months immediately preceding the application. In light of the seasonal nature of boating activity in the New York City area, the Chief, Special Services Division granted that waiver to permit NMSC to use data from the two months of August and September. NMSC's supplemental application, however, failed to distinguish with sufficient specificity between waiting time and actual use time as required by Section 80.371(c). NMSC was permitted thirty (30) days in which to amend the application. [2] NMSC filed an amended application with the Commission's Licensing Division in Gettysburg, Pennsylvania.

III. DECISION

5. In view of the discussion above, we find that while Niagara's Petition correctly notes that the rules do not provide for the assignment of multiple frequencies to new public coast stations, we believe that NMSC has satisfactorily demonstrated an operational requirement for the frequencies for which it applied. The data submitted by NMSC demonstrate that during the hours of operation sampled, the percentage of time during which the channels were occupied ranged from 44.94 to 91.90 percent, with the portion of that time spent as waiting and set-up time ranging from 10.70 to 26.50 percent. These factual showings satisfy the standards set by Section 80.371(c) and, therefore, we will waive Section 80.371(c) to the extent that we permit NMSC to operate on the three working frequencies.

6. We may waive a Commission rule if the underlying purpose of the rule would not be served by applying it in a particular case, and if grant of the waiver is otherwise in public interest. *See generally WAIT Radio v. FCC*, 418 F. 2d 1153, 1159 (D.C. Cir. 1969). The purpose of the requirement that an applicant demonstrate "heavy use" is to ensure that the applicant needs the frequency applied for and is not simply trying to "warehouse" the additional frequencies. NMSC has sufficiently demonstrated a need for three working frequencies in the New York harbor area. This decision will best serve the large boating community of the New York area by allowing NMSC to continue its public coast station service. NMSC's pending application, therefore, will be processed as an application for a new public coast station with multiple working frequencies. This decision supports the underlying pur-

[1] *See* letter from Chief, Aviation and Marine Branch to Alan Stein of NMSC, December 13, 1990.

[2] *See* letter from Chief, Special Services Division to Alan Stein of NMSC, March 13, 1991.

pose of Section 80.371(c), which is to ensure efficient use of maritime public correspondence frequencies and to preclude "warehousing" this scarce resource.

7. Accordingly, IT IS ORDERED THAT, pursuant to Section 309(d)(2) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(d)(2), Niagara's Petition to Deny NMSC's application for a license for a public coast station to serve the New York, New York area IS DENIED.

8. IT IS FURTHER ORDERED THAT NMSC's request for a waiver of Section 80.371(c) of the Commission's Rules, 47 C.F.R. § 80.371(c), and application for a public coast station to serve the New York, New York area ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-274

In the Matter of

Amendment of Section 73.202(b), RM-7802
Table of Allotments,
FM Broadcast Stations.
(Piedmont, Missouri)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 17, 1991; Released: October 1, 1991

Comment Date: November 22, 1991
Reply Comment Date: December 9, 1991

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition filed by Hunt Broadcasting Group, Inc. ("petitioner"), requesting the substitution of Channel 285C3 for Channel 285A at Piedmont, Missouri. Petitioner also requests a modification of its license for Station KPWB-FM, Channel 285A, to specify operation on Channel 285C3. Petitioner submitted information in support of the proposal and expressed its intention to apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration because adoption of the proposal would provide Piedmont, Missouri, with a wide coverage area FM station. Channel 285C3 can be allotted to Piedmont, Missouri, in compliance with the minimum distance separation requirements of the Commission's Rules at petitioner's specified site 13.1 kilometers (8.1 miles) northwest of the community.[1] Channel 285C3 at Piedmont would be short spaced to Channel 285A, Station KDXY, Paragould, Arkansas. However, Station KDXY was modified effective July 19, 1991, to specify operation on Channel 285C3 and to change its community of license to Lake City, Arkansas, in MM Docket 90-321. *See* 6 FCC Rcd 3325 (1991). The grant of a license for Channel 285C3, Piedmont, may, therefore, be withheld until Station KDXY is licensed on Channel 285C3 at Lake City, Arkansas. We shall also propose to modify petitioner's license for Station KPWB-FM to specify operation on Channel 285C3 in lieu of Channel 285A. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in the use of the higher powered channel at Piedmont or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

3. In view of the above, the Commission believes it is in the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Piedmont, Missouri	285A	285C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 22, 1991,** and reply comments on or before **December 9, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

John R. Wilner
Bryan, Cave, McPheeters
& McRoberts
700 Thirteenth Street, N.W., Suite 700
Washington, D.C. 20005-3960

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

[1] The coordinates for Channel 285C3 at Piedmont are 37-13-32 and 90-48-48.

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-183

In the Matter of

Amendment of Section 73.202(b), RM-7735
Table of Allotments,
FM Broadcast Stations.
(Lexington & Pickens,
Mississippi)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 18, 1991; Released: October 1, 1991

By the Assistant Chief, Allocations Branch:

1. At the request of J. Scott Communications, Inc. ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 3736 (1991), proposing the substitution of Channel 290C2 for Channel 290C3 at Lexington, Mississippi, the change of community of license for the channel from Lexington to Pickens, Mississippi, and modification of the license for Station WLTD(FM) to specify operation on Channel 290C2 at Pickens.[1] Petitioner filed comments stating its intention to apply for Channel 290C2 at Pickens. No other comments were received.

2. We believe the public interest would be served by substituting Channel 290C2 for Channel 290C3 and reallotting the channel from Lexington to Pickens, Mississippi and modifying Station WLTD(FM)'s license to specify Channel 290C2 at Pickens. Petitioner has shown that the reallotment of the channel from Lexington to Pickens will result in a preferential arrangement of allotments. Pickens (population 1,386)[2] would receive its first local aural transmission service. In addition, Lexington (population 2,628) will continue to receive local transmission service from Station WARR(FM) and Station WXTN(AM).

3. Channel 290C2 can be allotted to Pickens, Mississippi, at petitioner's specified site 26.3 kilometers (16.3 miles) southwest of the community consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.[3] In accordance with the provisions of Section 1.420(g) and (i) of the Commission's Rules, we will modify the license for Station WLTD(FM) to specify Pickens, Mississippi, as its community of license on Channel 290C2, in lieu of Channel 290C3 at Lexington, Mississippi.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 15, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
Lexington, Mississippi	273C3
Pickens, Mississippi	290C2

5. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WLTD(FM), Lexington, Mississippi, IS MODIFIED to specify operation on Channel 290C2, in lieu of Channel 290C3 at Pickens, Mississippi, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, J. Scott Communications, Inc., licensee of Station WLTD(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and upgrade.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

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[1] The license for Station WLTD(FM), Channel 290A, was modified to specify operation on Channel 290C3 in MM Docket No. 89-373, effective July 23, 1990. *See* 5 FCC Rcd 3481 (1990). J. Scott Communications, Inc., has filed an application for Channel 290C3 (BPH-901123IB).

[2] Population figures are from the 1980 U.S. census.

[3] The coordinates for Channel 290C2 at Pickens are 32-39-38 and 90-03-20.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-159

In the Matter of

Amendment of Section 73.202(b), RM-7719
Table of Allotments,
FM Broadcast Stations.
(Medicine Lodge, Kansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 18, 1991; Released: October 1, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 3523 (1991), issued in response to a petition filed by Florida Public Radio, Inc. ("petitioner"), proposing the substitution of Channel 269C2 for Channel 240A at Medicine Lodge, Kansas. Petitioner requested modification of its construction permit for Station KREJ, Channel 240A, to specify operation on Channel 269C2. Petitioner filed untimely comments with a motion to accept.[1] No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 269C2 for Channel 240A at Medicine Lodge, Kansas, since it would provide the community with its first wide coverage FM station. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site.[2] In addition, we have authorized a modification of the petitioner's construction permit for Station KREJ, Medicine Lodge, Kansas, to specify Section 1.420(g) of the Commission's Rules, since no other expressions of interest have been received.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 15, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Medicine Lodge, Kansas	269C2

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station KREJ, Medicine Lodge, Kansas, IS MODIFIED to specify operation on Channel 269C2 in lieu of Channel 240A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Florida Public Radio, Inc., permittee of Station KREJ, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] In view of the fact that this proceeding is uncontested, we have accepted the comments for the purpose of allowing petitioner to reaffirm its interest in applying for the channel.

[2] The coordinates for Channel 269C2 are 37-13-58 and 98-39-43.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-275

In the Matter of

Amendment of Section 73.202(b), RM-7786
Table of Allotments,
FM Broadcast Stations.
(Franklin, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 18, 1991; Released: October 1, 1991

Comment Date: November 22, 1991
Reply Comment Date: December 9, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Franklin Community Broadcasting ("petitioner"), permittee of Station KPXQ(FM), Channel 270A, Franklin, Texas, requesting the substitution of Channel 270C3 for Channel 270A at Franklin and modification of Station KPXQ(FM)'s construction permit to specify operation on the higher powered channel. Petitioner states it will apply for channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 270C3 for Channel 270A at Franklin, since it could enable Station KPXQ(FM) to expand its coverage area. Channel 270C3 can be allotted to Franklin in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.5 kilometers (6.5 miles) southeast to accommodate petitioner's desired transmitter site.[1] As requested, we also propose to modify petitioner's construction permit for Station KPXQ(FM) to specify operation on Channel 270C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Franklin or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Franklin, Texas	270A	270C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by Certified Mail, Return Receipt Requested, to the following applicant for Channel 269A at Temple: Bell County Broadcasting Company, 8515 Hatton Street, Houston, Texas 77025.

6. Interested parties may file comments on or before **November 22, 1991,** and reply comments on or before **December 9, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Shaun A. Maher, Esq.
Blair, Joyce & Silva
1825 K Street, N.W.
Suite 510
Washington, D.C. 20006
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such

[1] The coordinates for Channel 270C3 at Franklin are North Latitude 30-56-34 and West Longitude 96-25-59. We recognize that the proposed upgrade at Franklin is short-spaced to one application for Channel 269A at Temple, Texas, filed by Bell County Broadcasting Company (BPH-820524BJ). The application has been denied, and Bell County has filed an appeal in the United States Court of Appeals. *See Progressive Communications Inc.*, 3 FCC Rcd 5758 (Rev. Bd. 1988), *review denied*, 5 FCC Rcd 7058 (1990), *recon. dismissed*, 6 FCC Rcd 1383 (1991), *appeal pending sub nom Bell County Broadcasting Company et al. v. FCC*, No. 90-1611 (D.C. Cir. filed Dec. 27, 1990). Therefore, we will serve a copy of this *Notice of Proposed Rule Making* on Bell County Broadcasting Company.

a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-276

In the Matter of

Amendment of Section 73.202(b), RM-7804
Table of Allotments,
FM Broadcast Stations.
(Belton, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 18, 1991; Released: October 1, 1991

Comment Date: November 22, 1991
Reply Comment Date: December 9, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Sheldon Communications, Inc. ("petitioner"), licensee of Station KOOC(FM), Channel 292A, Belton, Texas, requesting the substitution of Channel 292C3 for Channel 292A at Belton, and modification of Station KOOC(FM)'s license to specify operation on the higher powered channel. Petitioner states that it will apply for channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 292C3 for Channel 292A at Belton, Texas, since it could provide the community with a wide coverage area FM service. Channel 292C3 can be allotted to Belton in compliance with the Commission's minimum distance separation requirements and can be used at Station KOOC(FM)'s licensed site.[1] As requested, we also propose to modify petitioner's authorization for Station KOOC(FM) to specify operation on Channel 292C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the Channel 292C3 at Belton or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Belton, Texas	292A	292C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 22, 1991,** and reply comments on or before **December 9, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John E. Fiorini III
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, D.C. 20005
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 292C3 at Belton are North Latitude 31-03-46 and West Longitude 97-31-54.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-277

In the Matter of

Amendment of Section 73.202(b), RM-7810
Table of Allotments,
FM Broadcast Stations.
(Oxford, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 18, 1991; Released: October 1, 1991

Comment Date: November 22, 1991
Reply Comment Date: December 9, 1991

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition filed by Oxford Radio, Inc. ("petitioner"), requesting the substitution of FM Channel 229C3 for Channel 229A at Oxford, Mississippi.[1] Petitioner also requests modification of the license for Station WKLJ-FM, Channel 229A, to specify operation on Channel 229C3. Petitioner submitted information in support of the proposal and expressed its intention to apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration because adoption of the proposal would provide Oxford with an additional wide coverage area FM station. Channel 229C3 can be allotted to Oxford, Mississippi, in compliance with the minimum distance separation requirements of the Commission's Rules at petitioner's specified site.[2] In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in the use of the higher powered channel at Oxford or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

3. We believe the public interest would be served by proposing the allotment of Channel 229C3 to Oxford, Mississippi, since it could provide the community with an additional wide coverage area FM station. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Oxford, Mississippi	229A, 238A, 248C1	229C3, 238A, 248C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 22, 1991,** and reply comments on or before **December 9, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Vincent J. Curtis, Jr.
Estella Salvatierra
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W., Suite 400
Washington, D.C. 20036

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The license for Station WKLJ-FM, Oxford, was modified to specify operation on Channel 229A in lieu of Channel 296A in MM Docket 91-6, effective July 25, 1991. *See* 6 FCC Rcd 3466 (1991).

[2] The coordinates for Channel 229C3 are 34-20-05 and 89-43-29.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

CICI, INC. File No. I-T-C-91-113

For authority pursuant to Sections 503 and 504(c) of the International Maritime Satellite Communications Act of 1978 and Section 214 of the Communications Act of 1934, as amended, to provide aeronautical and maritime mobile satellite service via the Inmarsat system

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: September 24, 1991; Released: October 1, 1991

By the Chief, International Facilities Division:

1. On May 13, 1991, CICI, Inc. (CICI) filed the above-captioned application requesting authority pursuant to Sections 503 and 504(c) of the International Maritime Satellite Communications Act of 1978, 47 U.S.C. §§ 752 and 753(c), and Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, to provide aeronautical and maritime mobile satellite service via the Inmarsat system. The application was placed on public notice on May 22, 1991. No comments or petitions were received. For the reasons set forth below, we grant the application.

2. CICI seeks authority to provide aeronautical mobile satellite service (AMSS) and maritime mobile satellite service (MMSS) in the Atlantic Ocean Region (AOR) and Pacific Ocean Region (POR) via the Inmarsat satellite system by means of authorized ground/coast earth stations at Niles Canyon, California[1] and Staten Island, New York.[2] CICI states that its service will be provided to aircraft in international flight and ship earth stations accessing Inmarsat. CICI also proposes to provide such other uses of the Inmarsat system as may be authorized by the Commission. CICI states that its provision of AMSS and MMSS will be consistent with the Commission's decisions in Common Carrier Docket No. 87-75 [3] and General Docket No. 84-1234.[4]

3. CICI states that the estimated total cost of the three ground/coast earth stations will be approximately $15 to $18 million. It states that revenues and operating costs cannot be estimated at this time. CICI states that charges and regulations governing the services will be specified in one or more tariffs which CICI will file with the Commission to the extent required by law.

4. CICI states that the present application serves the public interest, convenience and necessity because it will permit CICI to offer services that will greatly improve maritime and aviation communications, including the introduction of satellite communications to aircraft in transoceanic flight. It also states that this will further aviation safety, improve the efficiency of airline operations, and, for the first time, offer voice and data communications to transoceanic airline passengers. CICI also believes that competition will increase service options to the public, improve overall service, and reduce charges.

5. The Commission's goal of promoting competition in the provision of Inmarsat aeronautical services will be advanced by grant of this application, because it will permit competition in transoceanic aeronautical services that should increase service options to the public, improve overall service, and reduce charges. It will also advance the Commission's general policy to promote competition in the provision of maritime communications services in the manner contemplated by Congress.[5] Moreover, we have already found that the provision of Inmarsat aeronautical and maritime services by CICI will serve the public interest.[6] In File No. I-T-C-90-088, we conditioned our grant upon CICI being deemed a dominant carrier and filing a Section 214 application and a tariff. We also note that CICI, as a provider of Intelsat services, is already dominant under the provisions of the *International Competitive Carrier* decision.[7]

6. As conditions on the grant of this application, we will limit CICI's provision of aeronautical mobile satellite services to aircraft in international flight as defined by the Commission in CC Docket No. 87-75. In that decision, the Commission said that it would authorize the use of Inmarsat aeronautical services via U.S. aeronautical earth stations for aircraft in flight: (1) from the United States to a foreign point; (2) from a foreign point into the United States; and (3) between any two foreign points.[8]

7. Accordingly, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Sections 503 and 504(c) of the International Maritime Satellite Telecommunications Act of 1978, 47 U.S.C. §§ 752 and 753(c), IT IS ORDERED that the application of CICI, Inc., File No. I-T-C-91-113, IS GRANTED and CICI is authorized to acquire Inmarsat space segment capacity from the Communications Satellite Corporation and to use its facilities in its ground/coast earth stations at Niles Canyon, California, and Staten Island, New York,[9] to provide:

(i) maritime mobile satellite services to ships in the AOR and POR via Inmarsat satellites; and

(ii) international aeronautical mobile satellite services in the AOR and POR via Inmarsat satellites consistent with CC Docket No. 87-75 and Gen. Docket No. 84-1234.

8. IT IS FURTHER ORDERED that CICI shall, pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, file a tariff for the services authorized in this order before offering services to the public.

9. IT IS FURTHER ORDERED that CICI IS CLASSIFIED AS DOMINANT in its provision of all international services via the Inmarsat system to all points.

10. IT IS FURTHER ORDERED that CICI shall provide aeronautical satellite service only to aircraft in international flight as defined in the Commission's decision in CC Docket No. 87-75, 4 FCC Rcd 6072 (1989).

11. The Commission retains jurisdiction over this matter to ensure the nondiscriminatory use of, and equitable access to, the Inmarsat satellite system.

12. IT IS FURTHER ORDERED that the applicant shall comply with established arrangements for handing-off aeronautical traffic between the Inmarsat system and a domestic system in accordance with the Commission's decision in CC Docket No. 87-75.

13. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for Reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] File Nos. CSG-90-042-ML (POR) and CSG-90-084-ML (AOR-West).

[2] File No. CSG-90-085-ML (AOR-East).

[3] Provision of Aeronautical Services via the Inmarsat System, *Report and Order*, 4 FCC Rcd 6072 (1989), *recon. pending*.

[4] Amendment of Parts 2, 22, and 25 of the Commission's Rules to Allocate Spectrum for and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services, *Memorandum, Opinion, Order and Authorization*, 4 FCC Rcd 6041, 6060 n.6 (1989); *remanded Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428 (D.C. Cir. 1991).

[5] *Implementation of Requirements of the International Maritime Satellite Telecommunications Act*, 91 FCC 2d at 252.

[6] IDB Aeronautical Communications, Inc., File No. I-T-C-90-088, 6 FCC Rcd 2485 (1991).

[7] *Id.*

[8] *See* Provision of Aeronautical Services via the INMARSAT System, 4 FCC Rcd at 6078-79. We will not at this time authorize CICI to use U.S. earth stations to provide INMARSAT aeronautical service to aircraft in flight between two U.S. domestic points pending further proceedings in Gen. Docket No. 84-1234 and Commission action on various pending interim AMSS and land mobile satellite service (LMSS) applications. CICI will of course be expected to comply with further proceedings in Gen. Docket No. 84-1234.

[9] *See* n.1 and 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT/FTC INTERNATIONAL, INC. File No. I-T-C-91-179

Application for authority to acquire and operate facilities in the North Pacific Cable System for service to Japan.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: September 24, 1991; Released: October 1, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct switched message telephone services to Japan by the TRT/FTC International, Inc. (TRT/FTC).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-179 IS GRANTED, and TRT/FTC is authorized to:

a. acquire from TRT/FTC Communications, Inc., on a cost flow-through basis, a one-half interest in sixty (60) 64-kbps circuits in the North Pacific Cable System;[1]

b. lease and operate necessary domestic connecting facilities; and

c. use said facilities to provide TRT/FTC's regularly authorized services between the U.S. and Japan and beyond.

3. IT IS FURTHER ORDERED that this authorization is subject to the terms and conditions set forth in FTC Communications, Inc., 4 FCC Rcd 5633 (1989).

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between the applicant and its correspondent and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

7. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] TRT/FTC Communications, Inc. was previously authorized to acquire facilities in NPC for services between the U.S. and Japan provided with IDC, *see* American Telephone and Telegraph Company, 6 FCC Rcd 2870 (Com. Car. Bur. 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MATRIX TELECOM File No. I-T-C-91-176

Application for authority to operate
as an international resale carrier.

L.D. NETWORK, INC. File No. I-T-C-91-177

Application for authority to operate
as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: September 24, 1991; Released: October 1, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by Matrix Telecom and L.D. Network, Inc. (L.D. Network).

2. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-91-176 and I-T-C-91-177 ARE GRANTED, and

a. Matrix Telecom is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, US Sprint's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, TRT/FTC's Tariff F.C.C. No. 12 and Worldcom's Tariff F.C.C. No. 1 between the U.S. and the points listed in those tariffs; and

b. L.D. Network is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1 and 2, MCI's Tariff F.C.C. No. 1, US Sprint's Tariffs F.C.C. Nos. 1 and 2 and Execuline of Sacramento, Inc.'s Tariff F.C.C. No. 1 between the U.S. and the points listed in those tariffs.

3. IT IS FURTHER ORDERED that the applicants shall obtain any necessary operating agreements in each of the countries to which they will provide service and shall file them with the Commission within 30 days of their execution.

4. IT IS FURTHER ORDERED that the applicants shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

5. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORP. File No. I-T-C-91-175

Application for authority to lease and operate facilities for direct service between the U.S. and American Samoa.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: September 24, 1991; Released: October 1, 1991

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to American Samoa by MCI Telecommunications Corporation (MCI).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-175 IS GRANTED, and MCI is authorized to:

a. lease from Comsat and operate eight voice-grade satellite half-circuits between the Yacolt, Washington earth station and an appropriate satellite over the Pacific Ocean, connecting with similar circuits between the satellite and an earth station in American Samoa, furnished by MCI's correspondent in America Samoa;

b. own and operate eight voice-grade circuits in the Yacolt earth station to be used in conjunction with the satellite space segment;

c. own and operate eight voice-grade connecting circuits between the Yacolt earth station and MCI's Dominguez Hills, California, operating center; and

d. use said facilities to provide MCI's regularly authorized services, including switched voice service, between the U.S. and American Samoa and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between MCI and its correspondent in American Samoa, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's rules may be filed within 30 days of the date of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

MAJOR LEAGUE BASEBALL CSR-3441

Petition for Special Relief

MEMORANDUM OPINION AND ORDER

Adopted: September 16, 1991; Released: October 1, 1991

By the Commission:

INTRODUCTION

1. On August 13, 1990, Major League Baseball (hereinafter "Baseball") filed a petition for special relief seeking a clarification or, alternatively, a waiver of the Commission's network program nonduplication rules, 47 C.F.R. §§76.92-76.97. Specifically, Baseball seeks a determination that "[t]he term 'network program,' as defined in 47 C.F.R. §76.5(m), includes *all* live broadcasts of the same sports event. . . ." Public notice of Baseball's filing was given on September 4, 1990 (Mimeo No. 4676). Twenty-six parties have filed comments and Baseball and two other parties have filed replies. A list of all parties is contained in the Appendix.

2. The Commission's program exclusivity rules allow television broadcast station licensees to contract for and exercise network program nonduplication rights. 47 C.F.R. §§76.92-76.93. That is, a station holding such rights, subject to proper notification and certain exceptions, 47 C.F.R. §§76.94-76.95, may require that those "cable community unit[s] located in whole or in part within the geographic zone for a network program . . . shall not carry that program as broadcast by any other television signal. . . ." 47 C.F.R. §76.92(a).[1] According to the Commission's definitional rules, "A network program is any program delivered simultaneously to more than one broadcast station, regional or national, commercial or noncommercial." 47 C.F.R. §76.5(m). In this context, a network program is not necessarily a program of one of the major national television networks, but can be, for example, a program distributed by a regional sports network. *See, e.g., Cable TV of Fairmont*, 48 FCC 2d 991 (1974), *recon. denied*, 50 FCC 2d 976 (1975). So long as the program in question is distributed through a network, the station holding nonduplication rights may exercise them.[2]

3. The problem perceived by Baseball arises when a game is broadcast in the market where the game is played, and the visiting team's games are broadcast by a distant station (typically a "superstation") that is carried by cable systems located within the home team's market. In that context, the question has previously been raised whether two stations televising the same game but utilizing different announcers for the audio portion can constitute a regional network within the meaning of §76.5(m) of the Commission's Rules. The question was at that time tentatively answered in the negative. *Memorandum Opinion and Order in Docket No. 19417*, 56 FCC 2d 561, 569 (1975). The Commission suggested, however, that an *ad hoc* approach to the question of whether two telecasts constituted a single program distributed by a regional network would be the best decision-making approach, believing on the evidence before it that the problem "does not occur with regularity." *Id.* In filing its petition, Baseball suggests that this is no longer the case.

SUMMARY OF PLEADINGS

4. Baseball, in support of its petition, states that it seeks to ensure that baseball clubs obtain the same rights which are currently afforded suppliers of network and syndicated programming. Baseball further states that it does not seek to impose upon cable operators an obligation to black out all distant signal broadcasts of baseball games, but rather seeks merely to require deletions of distant signal broadcasts of games to which a local area broadcaster had been granted exclusive rights from a given baseball club. [3] Baseball notes that it had raised this issue previously in the context of the Commission's *Notice of Inquiry in MM Docket No. 89-600*, 5 FCC Rcd 362 (1989), although the issue was not resolved there. Baseball adds that the Commission, in recently revising the program exclusivity rules, rejected a request by Baseball to prohibit the substitution of live sports programming for syndicated programming that has been blacked out. The Commission reasoned that no other class of program exclusivity rights carries with it limitations on substitute programming, and concluded that sports programming should be treated no differently from other programming. *See Report and Order in Gen. Docket No. 87-24*, 3 FCC Rcd 5299, 5317 (1988), *recon. denied in pertinent part*, 4 FCC Rcd 2711, 2728 (1989), *aff'd sub nom. United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989). Based upon this rationale, Baseball claims that its clubs should therefore enjoy the same rights as other programmers do under the Commission's program exclusivity rules. Specifically, the home team station should be entitled to assert exclusive rights for the game against the broadcast of the game originated by the visiting team's station carried by cable systems in the home team's market. These rights are more necessary today than ever, maintains Baseball, due to the growth in the number of cable subscribers and the number of baseball games televised by superstations. While in 1975, notes Baseball, there were fewer than ten million cable subscribers, in 1990 more than fifty million persons subscribed to cable television, and some 700 Baseball telecasts were available nationally via nine superstations. Duplication of such programming -- inevitably on a simultaneous basis -- diminishes the value of the programming to a broadcaster, contends Baseball, and this is as true of sports programming as it is of network or syndicated programming. This importance, states Baseball, has been recognized by the appellate court, *United Video, Inc. v. FCC*, 890 F.2d at 1179-80, and is illustrated by the arrangement negotiated by the San Diego Padres with Cox Cable, the local cable franchisee, to ensure that Cox Cable will not carry telecasts of San Diego Padres games by distant superstations, preserving the position of Station KUSI-TV (Ind., Channel 51), San Diego, California, as the exclusive area outlet for San Diego Padres telecasts.[4] Baseball asserts that the inability of its clubs to grant exclusive rights to broadcasters disadvantages suppliers of live sports programming vis-a-vis suppliers of syndicated and network

programming, and "also places broadcasters at a competitive disavantage vis-a-vis cable." Baseball programming on both over-the-air and cable television has increased over the years, maintains Baseball, and its proposal for sports exclusivity will further this trend while at the same time alleviating a competitive imbalance.

5. In support of Baseball's petition, commenters assert generally that cable carriage of superstation telecasts of baseball games in a particular club's home territory places economic pressure on local stations which televise the games, and could lead such local stations to cease broadcasting the games. The potential for duplication, claim Stations WTXF-TV (Ind., Channel 29), Philadelphia, Pennsylvania, and KTVU (Ind., Channel 2), San Francisco, California (the latter filing jointly with the San Francisco Giants), can exceed 50% or 60%, based upon area cable system carriage of superstations. That the distant stations may utilize different production crews and announcers is of secondary importance, urge Stations KTTV (Ind., Channel 11), Los Angeles, California; KCRA-TV (NBC, Channel 3), Sacramento, California; WDAF-TV (NBC, Channel 4), Kansas City, Missouri; KPLR-TV (Ind., Channel 11), St. Louis, Missouri; and WPHL-TV (Ind., Channel 17), Philadelphia, Pennsylvania. The game itself and the right to televise it is the essential concern according to these commenters. Exclusivity rights should be protected to the same extent for sports programming as these rights are for other types of programming. Moreover, argue Baseball's supporters, it would be anomalous to mandate blackouts of distant sports telecasts, pursuant to §76.67 of the Rules, when no local telecast of a game is available, while allowing duplicating telecasts to be available over cable if a local telecast occurs.

6. In opposition to Baseball's petition, commenting parties raise both procedural and substantive issues. A number of parties contend that Baseball in fact seeks neither clarification nor a waiver of existing rules but rather a new blackout rule and policy, and that therefore Baseball should proceed through a Rule Making, rather than the Commission's special relief process. In addition, the National Cable Television Association maintains that even as a waiver request, Baseball's petition is defective due to insufficient service and Baseball's (and its member clubs') lack of standing to invoke exclusivity rules. Turner Broadcasting System, Inc. (TBS) and Tribune Broadcasting Company also note that Baseball and other sports interests have repeatedly sought exclusivity against distant sports telecasts since 1975, without success. Several parties argue, too, that Baseball and its supporters have provided no specific or quantified evidence of harm warranting Commission intervention, and thus Baseball's petition must fail pursuant to the waiver standard set out in *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

7. Turning to the substantive objections to Baseball's petition, most commenters opposing the petition note that sports programming *is* treated equally with all other programming for exclusivity purposes: the syndicated exclusivity and network program nonduplication rules apply equally to sports and nonsports programming alike. However, argue the commenters, the distant telecasts of which Baseball complains are in fact not duplicative, but are in fact independent and separate productions, as recognized by the Commission in *Docket No. 19417, supra*. Indeed, contend the commenters, citing 1 M. Nimmer and D. Nimmer, Nimmer on Copyright §§1.80[C][2], 2.09[F] (1985) (hereinafter "Nimmer on Copyright"), each telecast of a sports event is a separately copyrightable work, based upon the contributions of the director, camerapersons, and announcer(s). Such separate and distinct telecasts -- separately authorized by Baseball itself -- are no more a single "network program" than are separate telecasts of political conventions, holiday parades, and the like. To allow only one of such separate and distinct, independently copyrightable creative works exclusivity protection against all others, urge several opponents, would violate the constitutional rights of cable operators and cable subscribers. In addition, Baseball already enjoys favored status under federal antitrust laws, which distort the national competitive marketplace by allowing Baseball to carve out home team territories, rather than permitting each club to syndicate their product and sell rights nationally.

8. Opposing commenters further argue that Baseball's requested ruling would place an unwarranted burden on cable operators and nonbroadcast exhibitors of live sports programming, who would not be entitled to the expanded blackout protection that local commercial broadcasters would receive under Baseball's proposed regime. Moreover, as noted by the Satellite Broadcasting and Communications Association of America and by TBS, Baseball's request for exclusivity throughout a club's home territory would grant exclusivity rights on a far wider geographic scale than currently exists for network and syndicated programs. Nor, note opponents, has Baseball provided any public interest justification for its request, particularly in view of Baseball's admission that the number of local telecasts of baseball games has increased by 11% from 1984 to 1989. TBS further notes that, at least in the case of TBS' Television Broadcast Station WTBS (Ind., Channel 17), Atlanta, Georgia, Baseball is compensated by the Atlanta Braves for the nationwide cable carriage of WTBS.

9. In reply, Baseball argues that its filing is procedurally proper, and that a Rule Making proceeding is not a necessary prerequisite for granting the relief sought, particularly because Baseball relies on Commission policy enunciated in *Gen. Docket No. 87-24, supra*. Both this docket and the court decision upholding it, claims Baseball, mandate the interpretation of the rules requested by Baseball. Contracts between Baseball clubs and local broadcasters for exclusivity are as deserving of protection as any other contracts for exclusivity, maintains Baseball. It is the contractual rights of the parties which is at issue, Baseball contends, not the contents of the telecasts, which are of the same game, whether or not different audio and camera footage is contained in the local and distant telecasts. These rights, Baseball states, find protection in case law, citing, *inter alia*, *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Johnson-Kennedy Radio Corp. v. Chicago Bears Football Club, Inc.*, 97 F.2d 223 (7th Cir. 1938); *ABC Sports, Inc. v. Atlanta National League Baseball Club, Inc.*, No. 82 Civ. 6104 (S.D.N.Y. Oct. 4, 1982); and *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (W.D. Pa. 1938). Allowing the importation of distant telecasts of games lessens the value of the exclusive rights licensed by Baseball, which is of increasing concern given the number of superstations telecasting baseball games, none of which superstations existed as such in 1975. In fact, notes Baseball, just three superstations -- Stations WGN-TV (Ind., Channel 9), Chicago, Illinois; WWOR-TV (Ind., Channel 9), Secaucus, New Jersey; and WTBS -- reach 31 million, 13 million,

and 54 million cable households, respectively, and in 1990 "televised approximately 320 Baseball games, *more than 150* of which duplicated games televised by other flagship stations." (Footnote omitted.) Failure to grant the ruling requested, Baseball maintains, will reduce the diversity of baseball programming on free television. While Baseball's opponents contend that flagship stations televised more games in 1990 than in previous years, Baseball contends that the majority of stations "chose not to carry many of the games that Baseball Clubs made available to them." The exclusivity sought by Baseball will, it maintains, increase viewer options, and no viewer will lose the game itself. Baseball states that the ruling it seeks is a proper interpretation of the existing exclusivity rules. That these rules distinguish between broadcast and non-broadcast services, states Baseball, is not grounds to deny the present petition. Baseball asserts that the ruling it seeks is consistent with the Communications Act of 1934, as amended, and with the first amendment.

10. Supporting Baseball in reply, CBS, Inc. asserts that the lack of sports exclusivity threatens the ability of local stations to bid for local broadcast rights to baseball games. The Network Affiliated Stations Initiative maintains that "[t]he legitimacy and importance of exclusivity in promoting program investment, diversity and quality is beyond question," and that exclusivity provides a limited antidote "to the market distorting bias toward cable created by the compulsory license."

DISCUSSION

11. We shall deny Baseball's request.[5] The situation that Baseball complains of arises from the fact that it is not a single telecast whose duplication by a distant station gives rise to Baseball's exclusivity proposal. Rather, Baseball has itself authorized two separately created telecasts, albeit of the same event, by separate and unconnected broadcasters. Two programs, not one, are created, each with its own audio and video. Because the telecasts are separate programs, they are not "network programs" within the meaning of §76.5(m) of the Commission's Rules and are not entitled to protection under our network program nonduplication rules.

12. In 1975, we tentatively found that separate stations televising the same sporting event utilizing different announcers do not constitute a network. *Docket No. 19417, supra.* Baseball has provided us with no convincing reasons to change our view. Multiple telecasts of the same sporting event, utilizing separate cameras, announcers, and directors, do not constitute network programming, and are not, therefore, protected by our rules. To the extent that Baseball urges that it is the game itself rather than its telecast that is deserving of exclusivity, the weight of authority holds that baseball games are not copyrightable, though their fixed telecasts may be. *See, E.g., National Association of Broadcasters v. Copyright Royalty Tribunal*, 675 F.2d 367, 378 (D.C. Cir. 1982); *Production Contractors, Inc. v. WGN Continental Broadcasting Co.*, 622 F. Supp. 1500, 1503 (N.D. Ill 1985); H.R. Rep. No. 1467, 94th Cong., 2d Sess. 52 (1976); Nimmer on Copyright §§1.08[C][2], 2.09[F] (1985). Our exclusivity rules, the appellate court has held, cannot be applied to noncopyrighted works. *United Video, Inc. v. FCC*, 890 F.2d at 1192. The same rationale must apply to noncopyrightable works, such as baseball games themselves, as opposed to their telecasts.

13. Baseball urges that, for purposes of the Commission's program exclusivity rules, sports programming should be treated no differently than network (or syndicated) programming, which is entitled to receive exclusivity protection. In fact, not only Baseball's but also all other sports programming already is treated equally with all other programming for program exclusivity purposes. Specific sports telecasts distributed through a network are entitled to the protection of the program exclusivity rules. *Cable TV of Fairmont, supra.* Baseball itself recognizes the existence of regional sports networks, and their ability to negotiate and enforce exclusivity rights with area cable systems. The situation of which Baseball complains is in reality created by Baseball's own licensing arrangements. Baseball creates a separate stream of revenues from each of its member clubs by licensing the rights to telecast each club's games to a station local to the club. As clubs play each other, each game is telecast by two stations, the home club's station and the visitors' station. That some of these performances will compete nationwide, by means of certain superstations, is Baseball's own choice.[6]

14. Nor do the court decisions cited by Baseball compel the result Baseball seeks. In both *Johnson-Kennedy Radio Corp. v. Chicago Bears Football Club Inc., supra*, and *Pittsburgh Athletic Co. v. KQV Broadcasting Co., supra*, what was at issue were attempts by other local market broadcasters to broadcast the home team's sporting events, in violation of the broadcast rights purchased by the home team's flagship station. Similarly, in *Zacchini v. Scripps-Howard Broadcasting Co., supra*, a television station not licensed to do so sought to broadcast -- without compensation -- the entirety of a performer's act at a county fair. In the present situation, Baseball has separately licensed distinct telecasts of sporting events. *ABC Sports, Inc. v. Atlanta National League Baseball Club, Inc., supra*, in which WTBS was enjoined from broadcasting the 1982 National League Championship series, exclusive broadcast rights to which had been granted to ABC, is also distinguishable. In this latter case, Baseball had separately licensed national broadcast rights to the National League Championship series exclusively to ABC, "a broader right to exclusivity . . . than with respect to regular season games." *Id.*, slip op. at 10. In addition, as the district court further noted, "it would clearly constitute unjust enrichment if the Atlanta Braves and Turner Broadcasting System were permitted to benefit for a second time by granting WTBS rights which ABC has already paid for." *Id.*, slip op. at 34. In the present case, however, it is Baseball which has already created and been compensated for two separate performances from a given game, yet seeks to block the cablecasts of one of the two performances. Such a result is not compelled by the cases cited.

15. In view of the foregoing, we find that grant of Baseball's petition is not in the public interest.

16. Accordingly, IT IS ORDERED, That the petition for special relief (CSR-3441) filed August 13, 1990, by Major League Baseball, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Comments

Cablevision Systems Corporation

Cencom Cable Television

Eastern Microwave, Inc.

Fox Television Stations Inc.

Great American Television and Radio Company, Inc.; Kelly Broadcasting Company; Koplar Communications, Inc.; and WPHL-TV, Inc.

KMPH-TV

KMST-TV

KRBK-TV

KTVU, Inc. and the San Francisco Giants Baseball Club

KTXH-TV

National Cable Television Association

Satellite Broadcasting and Communications Association of America

Tele-Communications, Inc.; United Artists Entertainment Co.; Continental Cablevision, Inc.; TeleCable Corporation; and United Video Cablevision, Inc.

Tribune Broadcasting Company

Turner Broadcasting System, Inc.

United Video, Inc.

WTXF-TV

WWOR-TV, Inc.

Reply Comments

CBS Inc.

Major League Baseball

Network Affiliated Stations Initiative

FOOTNOTES

[1] A community unit is a cable television system or portion thereof which operates in a separate, distinct community or municipal entity. 47 C.F.R. §76.5(dd). A network program's geographic zone is, usually, a 35-mile zone extending from a specified reference point in the community of license of the broadcast station. Smaller market stations enjoy a secondary protection zone of an additional 20 miles. 47 C.F.R. §76.92 note.

[2] A separate rule specifically addresses blackouts of sports broadcasts in local home team territories allowing local holders of broadcast rights to prevent area cable systems from carrying a live television broadcast of a local sports event if the event is not available live off-the-air to local area viewers. 47 C.F.R. §76.67.

[3] Baseball states that, "[u]nder various league rules and agreements, each Baseball club is authorized to grant exclusive telecasting rights to broadcasters located inside of that club's home territory." However, Baseball does not now define the geographic zone of a club's home territory, which appears to exceed the Commission's current territorial limits for network nonduplication protection set out in §73.658(m) of the Commission's rules.

[4] Baseball contends that this arrangement is due to the existence of a joint venture regional sports network on the part of the San Diego Padres and Cox Cable.

[5] We perceive no procedural bars to consideration of Baseball's petition. Baseball clearly has standing, pursuant to §76.7(a) of the Rules, as an "interested person [seeking] a ruling on a . . . disputed question."

[6] Contrary to the position of some of the commenting parties, we do not perceive an "anomaly" in the application of the sports black-out rule and the network program nonduplication rule. Those rules are based on different premises and are designed to serve different goals. *Compare Sports Broadcasts*, 54 FCC 2d 265, 281 (1975), *with Program Exclusivity*, 3 FCC Rcd 5299, 5318 (1988), *reconsidered in part*, 4 FCC Rcd 2711, *aff'd sub. nom. United Video, Inc. v. FCC*, 890 F.2d 1173 (D.C. Cir. 1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT
COMMUNICATIONS COMPANY,
Complainant,

v. File No. E-90-38

AMERICAN TELEPHONE
AND TELEGRAPH
COMPANY,
Defendant.

ORDER

Adopted: September 25, 1991; Released: October 2, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On October 24, 1989, US Sprint Communications Company ("Sprint") filed the above-captioned formal complaint against the American Telephone and Telegraph Company ("AT&T") alleging that AT&T violated Sections 201(b), 202(a) and 203(c) of the Communications Act, 47 U.S.C. §§ 201(b), 202(a) and 203(c), in connection with their tariffed volume discounts for AT&T's 800 Service. On September 24, 1991, however, Sprint filed a request for withdrawal of the complaint without prejudice, indicating that it does not wish to pursue its claims against AT&T. The request is unopposed.

2. On the basis of the statements contained in Sprint's unopposed request, we conclude that the public interest would be served by granting the request.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Sprint's request to withdraw its complaint without prejudice IS GRANTED and that the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT
COMMUNICATIONS COMPANY
LIMITED PARTNERSHIP,
Complainant,

v.

SOUTHERN BELL TELEPHONE
AND TELEGRAPH COMPANY File No. E-90-120
and
SOUTH CENTRAL BELL File No. E-90-121
TELEPHONE COMPANY,
Defendants.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

ORDER

Adopted: September 26, 1991; Released: October 2, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On March 15, 1990, US Sprint Communications Company Limited Partnership (hereinafter "Sprint") filed with the Commission the above-captioned formal complaints against Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company (hereinafter the "Defendants") seeking recovery of damages for Defendants' alleged overearnings for the period January 1, 1987 through December 31, 1988. In accordance with Commission rules governing formal complaint proceedings, the Defendants filed answers to the complaints.

2. The parties to the above-captioned complaints have conducted discussions aimed at settling the complaints. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies was reached. On September 25, 1991, the parties filed a joint motion seeking dismissal of the complaints with prejudice. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Joint Motion to Dismiss the above-captioned complaints IS GRANTED and that the proceedings ARE TERMINATED.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

US SPRINT
COMMUNICATIONS COMPANY
LIMITED PARTNERSHIP,
Complainant,

v.
SOUTHERN BELL TELEPHONE
AND TELEGRAPH COMPANY File No. E-89-376
and
SOUTH CENTRAL BELL File No. E-89-377
TELEPHONE COMPANY,
Defendants.

ORDER

Adopted: September 26, 1991; Released: October 2, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On September 20, 1989, US Sprint Communications Company Limited Partnership (hereinafter "Sprint") filed with the Commission the above-captioned formal complaints against Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company (hereinafter the "Defendants") seeking recovery of damages for Defendants' alleged overearnings for the period October 1, 1985 through December 31, 1986. In accordance with Commission rules governing formal complaint proceedings, the Defendants filed answers to the complaints.

2. The parties to the above-captioned complaints have conducted discussions aimed at settling the complaints. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies was reached. On September 25, 1991, the parties filed a joint motion seeking dismissal of the complaints with prejudice. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Joint Motion to Dismiss the above-captioned complaints IS GRANTED and that the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-278

In the Matter of

Amendment of Section 73.202(b), RM-7809
Table of Allotments,
FM Broadcast Stations.
(Minneapolis, Kansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 18, 1991; Released: October 2, 1991

Comment Date: November 25, 1991
Reply Comment Date: December 10, 1991

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by Belinda S. Ohlemeier ("petitioner"), requesting the substitution of Channel 224C2 for Channel 224A at Minneapolis, Kansas. Petitioner also requests modification of her construction permit (BPH-900829MD) for Channel 224A to specify operation on Channel 224C2.[1]

2. We believe petitioner's proposal warrants consideration. Channel 224C2 can be allotted to Minneapolis, Kansas, consistent with the Commission's spacing requirements, at petitioner's specified site.[2] We shall also propose to modify the construction permit for Channel 224A to specify operation on Channel 224C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. We believe the public interest would be served by proposing the substitution of Channel 224C2 for Channel 224A at Minneapolis, Kansas, since it would provide the community with a wide coverage area station. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Minneapolis, Kansas	224A	224C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 25, 1991,** and reply comments on or before **December 10, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Allen G. Moskowitz
Kaye, Scholer, Fierman,
Hays & Handler
901 Fifteenth Street, N.W., Suite 1100
Washington, D.C. 20005

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The construction permit for Channel 224A was granted on August 13, 1991.

[2] The coordinates for Channel 224C2 are 39-00-52 and 97-37-42.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-646

In the Matter of

Amendment of Section 73.202(b), RM-7524
Table of Allotments,
FM Broadcast Stations.
(Yreka, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 18, 1991; Released: October 2, 1991

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 6 FCC Rcd 109 (1991), issued in response to a petition filed on behalf of Dalmation Enterprises, Inc. ("petitioner"), licensee of Station KYRE(FM), Channel 249C2, Yreka, California, proposing the substitution of Channel 280C1 for Channel 249C2 at Yreka, and modification of its license to specify operation on the non-adjacent higher powered channel. Petitioner filed supporting comments in response to the *Notice*. No other comments were received.

2. We believe the public interest will be served by granting the modification proposal at Yreka since it will enable Station KYRE(FM) to provide an enhanced service to the community. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we will substitute Channel 280C1 for Channel 249C2 at Yreka and modify the license for Station KYRE(FM) accordingly. We will not allot Channel 293C1 to Yreka, as proposed in the *Notice* as an additional equivalent class channel for use by other interested parties, since no interest in the use of the channel was expressed. As indicated in the *Notice*, Channel 280C1 can be allotted to Yreka at the petitioner's present transmitter site.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 18, 1991**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Yreka, California	280C1

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Dalmation Enterprises, Inc. for Station KYRE(FM), Yreka, California, IS MODIFIED to specify operation on Channel 280C1 in lieu of Channel 249C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Dalmation Enterprises, Inc., licensee of Station KYRE(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Coordinates at the licensed site of Station KYRE(FM) at Yreka are 41-36-34 and 122-37-29.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-415

In the Matter of

Amendment of Section 73.202(b), RM-6943, RM-7257
Table of Allotments,
FM Broadcast Stations.
(Cleveland and Rosedale,
Mississippi)[1]

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 24, 1991; Released: October 2, 1991

By the Chief, Allocations Branch:

1. Before the Commission is the *Notice of Proposed Rule Making*, 4 FCC Rcd 7063 (1989), issued at the request of Carol B. Ingram ("petitioner"), permittee of Station WEZU, Channel 295A, Cleveland, Mississippi, proposing the substitution of Channel 252C3 for Channel 295A at Cleveland and modification of her construction permit for Station WEZU to specify operation on Channel 252C3 in lieu of Channel 295A. William J. Pennington, III ("Pennington") and Wayne B. Dowdle, Jr. ("Dowdle") separately filed brief comments expressing interests in applying for Channel 252C3 at Cleveland.[2] Petitioner filed comments and a counterproposal[3] requesting that Channel 298A be deleted at Cleveland and reallotted to Rosedale, Mississippi, as Channel 298C3 and that her construction permit for Station WEZU be modified to specify operation on Channel 298C3 at Rosedale. Petitioner and Pennington filed reply comments.

2. Petitioner, in her comments, states that since two expressions of interest have been filed for Channel 252C3 at Cleveland and since no other equivalent class of channel is available for allotment to Cleveland, the Commission's Rules on nonadjacent upgrades preclude modification of her construction permit to specify operation on Channel 252C3 in lieu of Channel 295A at Cleveland. As an alternative, petitioner counterproposes the deletion of Channel 295A at Cleveland, its reallotment to Rosedale as Channel 298C3, and the modification of her construction permit for Station WEZU(FM) to specify operation on Channel 298C3 at Rosedale. Petitioner believes that grant of her counterproposal would serve the public interest because it would provide Rosedale with its first local broadcast service, would also enable the Commission to allot Channel 252C3 to Cleveland to accommodate the expressions of interest there, and may avoid an administrative hearing for Channel 252C3 at Cleveland if only one application is actually filed for that channel. With respect to Rosedale, petitioner states that it is the county seat of Bolivar county and has a population of 2,793 persons. She adds that Rosedale is located in close proximity to the Mississippi River, and major businesses include agriculture, timber, river barges, and fish farming. Petitioner further indicates that her counterproposal will not deprive Cleveland of its only local broadcast service as it already has two existing FM stations and one AM station. She also believes that no existing station, construction permit holder, or applicant will be prejudiced by the relief sought by her counterproposal.

3. Pennington, in his reply comments, reaffirms his interest in applying for Channel 252C3 at Cleveland. Pennington argues that if there is an interest in assigning a frequency to Rosedale, then Channel 298A should be assigned to the community without the need to substitute another channel for petitioner's Channel 295A at Cleveland. Pennington notes that a tower site for Channel 298A's use at Rosedale could be located in an area providing adequate spacing with the present site for Channel 295A at Cleveland, thus negating the need for petitioner to change its frequency. Pennington also questions whether Rosedale can support a new facility. Pennington points out that the town has only 2,793 persons and is one of the economically poorest areas in the U.S. Pennington contends that the area that a proposed C3 facility at Rosedale could technically cover could not provide the adequate advertising income needed to properly operate the facility in the public interest.

4. In her reply comments, petitioner reiterates arguments made in her comments and asserts that the public interest would be served by the adoption of the counterproposal since it would provide a first local aural service to Rosedale. She also reaffirms her interest in constructing and operating a new station on Channel 298C3 at Rosedale.

5. As correctly noted by petitioner, in situations involving a nonadjacent upgrade request, the Commission's Rules require the availability of an additional equivalent class channel in the community to meet the needs of any interested parties. Since an additional expression of interest was filed for Channel 252C3 at Cleveland and since no showing was made that there is an additional equivalent class channel available at Cleveland, the Commission's rules on nonadjacent upgrades preclude modification of petitioner's construction permit to specify operation on Channel 252C3 at that community. However, in view of Pennington's valid expression of interest in Channel 252C3 at Cleveland, we believe the public interest would be served by allotting Channel 252C3 at Cleveland and opening up a filing window for applications because this would result in a wide coverage area station for Cleveland.

6. We also believe that the public interest would be served by granting petitioner's counterproposal. Petitioner has demonstrated that the reallotment of Channel 298C3

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[1] The community of Rosedale has been added to the caption.

[2] Dowdle's comments are procedurally defective. Dowdle failed to file the correct number of copies and failed to show that his comment was timely filed with the Commission at the Secretary's Office. *See* Sections 1.420(e), 0.11(b) and 0.401(a)(1)(i) and (ii). Therefore, these comments will not be accepted as a valid expression of interest in the Cleveland allotment.

[3] Public Notice of the counterproposal was given on February 6, 1990, Report No. 1807.

to Rosedale would result in a preferential arrangement of allotments because that community would receive its first local aural service.[4] This action will not deprive Cleveland of its only local aural transmission service as Stations WRDC(AM), WCLD(AM) and (FM), and WQAZ(FM) are licensed to Cleveland. Regarding Pennington's suggestion that we allot Channel 298A to Rosedale in lieu of Channel 298C3 and retain Channel 295A at Cleveland, this is not a viable option since there have been no expressions of interest in the allotment of Channel 298A to Rosedale. Therefore, as proposed, we will delete Channel 295A at Cleveland, allot Channel 298C3 to Rosedale, and modify petitioner's construction permit for Station WEZU(FM) to specify operation on Channel 298C3 at Rosedale.[5] Finally, Pennington's arguments regarding the potential impact of the proposed allotment to Rosedale are without merit. This is due to the fact that the Commission no longer considers such economic arguments in FM and TV allotment proceedings. *See Policies Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 (1988), *recon. denied*, 4 FCC Rcd 2276 (1989).

7. Channel 298C3 can be allotted to Rosedale in compliance with the Commission's minimum distance separation requirements with a site restriction of 18.8 kilometers (11.7 miles) northeast of the community to avoid a short-spacing to Station WKXI-FM, Channel 298C1, Magee, Mississippi.[6] Channel 252C3 can be allotted to Cleveland in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.7 kilometers (8.5 miles) northwest of the community to avoid a short spacing to Station WBAQ(FM), Channel 250C2, Greenville, Mississippi, and Station KYEA, Channel 252C2, West Monroe, Louisiana, and a proposed Station KYEA upgrade for Channel 252C1.[7]

8. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 18, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

City	Channel No.
Rosedale, Mississippi	298C3
Cleveland, Mississippi	224A, 280A, 252C3

9. The window period for filing applications for Channel 252C3 at Cleveland, Mississippi, will open on **November 19, 1991,** and close on **December 19, 1991**.

10. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of Carol B. Ingram for Station WEZU(FM) IS MODIFIED to specify Rosedale, Mississippi, in lieu of Cleveland, Mississippi, as its community of license, and specify operation on Channel 298C3, in lieu of Channel 295A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

11. IT IS FURTHER ORDERED, That the Secretary of the Commission Shall Send By Certified Mail, Return Receipt Requested, a copy of this *Report and Order* to the following:

Wayne B. Dowdle, Jr.
P.O. Box 3
Meridian, MS 39302

12. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

13. For further information concerning this proceeding, contact Arthur D. Scrutchins, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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[4] Since Rosedale, Mississippi, is both incorporated and listed in the U.S. Census, we may presume its status as a community for allotment purposes.

[5] This is in compliance with Section 1.420(i) of the Commission's Rules which states in part that, during the course of a rule making proceeding to amend Section 73.202(b) and Section 73.606(b), the Commission may modify the license or permit of an FM or television broadcast station to specify a new community of license where the amended allotment would be mutually exclusive with the licensee's or permittee's present assignment. In this case the use of Channel 298C3 at Rosedale is mutually exclusive with the use of Channel 295A at Cleveland.

[6] The coordinates for Channel 298C3 at Rosedale are North Latitude 33-56-20 and West Longitude 90-51-10.

[7] The coordinates for Channel 252C3 at Cleveland are North Latitude 33-52-00 and West Longitude 90-45-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Complaint of
Michael D. Richardson against
Radio Station KFMH(FM), Muscatine, IA

ORDER

Adopted: September 17, 1991; Released: October 2, 1991

1. The Commission has under consideration a March 6, 1991, Application for Review of the February 26, 1991, action by the Mass Media Bureau, Enforcement Division, dismissing a complaint dated January 5, 1991, by Michael D. Richardson against Radio Station KFMH(FM), Muscatine, Iowa.

2. The Commission sees no reason to disturb the decision of the Mass Media Bureau. ACCORDINGLY, IT IS ORDERED, That, Pursuant to Section 1.115(g) of the Commission's rules, said Application for Review is DENIED.[1]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] The Bureau's references to Section 312 of the Communications Act, 47 U.S.C. § 312, should have been to Section 3451 of the Anti-Drug Abuse Act of 1986, 47 U.S.C. § 312a.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-80

In re Applications of

LORRAINE WALKER ARMS	File No. BPCT-881202KK
TIERRA ALTA BROADCASTING, INC.	File No. BPCT-881205KJ
ECHONET CORPORATION	File No. BPCT-881205KM

For Construction Permit for
New Television Station, Channel 15,
Las Vegas, Nevada

Appearances

David D. Oxenford, Esq., and *Lester Spillane*, Esq., on behalf of Lorraine Walker Arms; and *Paul A. Zevnik, Esq.* on behalf of Tierra Alta Broadcasting, Inc.

DECISION

Adopted: September 24, 1991; Released: October 4, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

Board Chairman MARINO:

1. Under review is the *Initial Decision* (I.D.) of Administrative Law Judge Edward Luton (ALJ), 6 FCC Rcd 1777 (1991), in which he considered the mutually exclusive applications of Lorraine Walker Arms, Tierra Alta Broadcasting, Inc. (Tierra Alta), and Echonet Corporation (Echonet) for authority to construct a new television station on Channel 15 in Las Vegas, Nevada. The only issue heard was the standard comparative issue, under which the ALJ concluded that Tierra Alta was the preferred applicant. Echonet has not filed timely exceptions to the denial of its application, and it will therefore be dismissed for failure to prosecute pursuant to 47 CFR §1.276(f). Arms has excepted to the ALJ's result and Tierra Alta has filed limited exceptions. Upon review of the record, which presents no unusual or complex questions warranting an oral argument, we conclude that the I.D.'s grant to Tierra Alta should be affirmed.

2. The ALJ credited the integration proposals of Arms, an individual proprietor, and Tierra Alta, a corporation whose voting stock is entirely owned by Irma Rico, its sole officer and director, to work full time as the general managers of their proposed stations. Because he found that both applicants were entitled to 100% quantitative integration credit and that neither suffered a diversification demerit, the ALJ decided the case under the qualitative enhancement factors. The ALJ concluded that Tierra Alta was superior based on Rico's cumulative enhancements for female credit, minority status, past local residency and promised future local residency, participation in local civic activity, and past broadcast experience. I.D., paras. 20, 22, 24.

3. In her exceptions, Arms argues that Tierra Alta is entitled to no integration credit because "the applicant appears to be nothing more than a creation of counsel" with little or no participation by Ms. Rico. In support of this contention, Arms claims the record reveals that counsel brought to Ms. Rico's attention the filing opportunity; that the same counsel had also represented Ms. Rico in a previous FM application in Woodlake, California, which application was dismissed; that counsel was involved in bringing in an engineer; that the engineer conducted negotiations with the site owner; and that Ms. Rico did not personally obtain the applicant's funding, which raises a question as to whether its financing letter was a mere accommodation requiring a remand. Furthermore, Arms contends that full inquiry into Ms. Rico's Woodlake application and the circumstances of a settlement she reached with another applicant in this proceeding was precluded by rulings of the ALJ. Finally, Arms challenges the ALJ's analysis of the qualitative enhancements, and contends that she should have received preferences for residence, civic activity, and broadcast experience, which would overcome Tierra Alta's advantage for minority status.

4. We reject these exceptions. To begin with, we do not agree with Arms that there is sufficient record evidence to establish that the Tierra Alta applicant is merely the *alter ego* of its counsel with no legitimate role played by its owner, Ms. Rico. While we will certainly deny credit for "paper proposals" when we find them, *see, e.g., Royce International Broadcasting*, 5 FCC Rcd 7063, 7064 (1990), *recon. denied*, 6 FCC Rcd 2601 (1991); *Metroplex Communications, Inc.*, 5 FCC Rcd 5610 (1990); *Coastal Broadcasting Partners*, 6 FCC Rcd 4242, 4248 (Rev. Bd. 1991); *Atlantic City Community Broadcasting, Inc.*, 6 FCC Rcd 925, 932-934 (Rev. Bd. 1991), the record evidence must be strong enough to compel such a result and to specifically show that the integration proposal is inherently unreliable. *See Coastal, supra*, at 4248. The record here in this respect is very sparse and weak, and as will appear below, does not support Arms' allegations.

5. First, as to site selection, Ms. Rico specifically testified that it was she, rather than counsel, who hired the engineering consultant firm and made direct contact with them, that they provided information on a suitable transmitter site to her, and that the engineer spoke to the site owner on her behalf. Tr. 123-126. Nothing in this testimony indicates that Ms. Rico was "out of the loop" with respect to this important aspect of her application. Similarly, as to equipment needs, she stated that counsel contacted a supplier on her behalf but that she also spoke to suppliers and obtained quotations on equipment costs for the station. Tr. 126-127. With regard to financing, Ms. Rico testified that she is personally paying all of the prosecution costs of her application without any loan assistance (Tr. 158-159). She also testified, however, that although she was familiar with Twentieth Century Funding, that the financing letter Tierra Alta obtained from Twentieth Century Funding was sent directly to counsel's office without prior contact with the lender by Ms. Rico (Tr. 127-129). By itself, this would not necessar-

ily prove that Ms. Rico was insignificantly involved in her application. *Compare Evansville Skywave, Inc.*, FCC 91R-81, released September 18, 1991, para. 12 ("passive" investors totally orchestrated and stage-managed application). Finally, we point out that here, unlike such cases as *Poughkeepsie Broadcasting Ltd.*, 6 FCC Rcd 2497, 2498 n. 3 (1991), where the Commission has closely scrutinized applications involving allegedly passive investors where the attorney has played an active formational role, Ms. Rico owns all of the issued or subscribed stock and there are no other investors. *See* Tierra Alta Exhs. 1, 2.

6. Furthermore, Arms has not supported her allegation that the letter was a mere accommodation requiring a remand at this time on a financial issue. It produced no evidence, and did not even allege, that the letter (which it did not introduce as a hearing exhibit) was deficient in any respect in providing the requisite reasonable assurance, nor did it submit any evidence from a representative of the subject lending institution that would undermine the *bona fides* of its stated intent to provide financing. *See generally A. P. Walter, Jr.*, 6 FCC Rcd 875, 877 (Rev. Bd. 1991), and cases cited therein. More importantly, Arms did not at any time seek from the ALJ the financial issue she now wishes to belatedly raise with the Board. *See Priscilla L. Schwier*, 3 FCC Rcd 4355, 4358 n. 5 (Rev. Bd. 1988)(exception to financial qualifications denied where exceptor never sought to enlarge issue on this point), *rev. denied*, 4 FCC Rcd 2659 (1989), *aff'd by judgment sub nom. New Life Evangelistic Center, Inc. v. FCC*, No. 89-1256 (D.C. Cir. February 7, 1990). Nor has Arms even attempted to meet the Commission's stringent test that is traditionally applied for reopening the hearing record at this stage of the proceeding. *See KFPW Broadcasting Co.*, 44 FCC 2d 310 (1973); *The News-Sun Broadcasting Co.*, 27 FCC 2d 61 (1971); *see also Great Lakes Broadcasting, Inc.*, FCC 91-198, released July 16, 1991, at para. 15 (Commission policy is strict adherence to standards of 47 CFR §1.229, including requirement that petitions to enlarge issues rely on new evidence that could not reasonably have been discovered earlier); *accord, Texas Communications Ltd. Partnership*, FCC 91-270, released September 4, 1991, n. 8.

7. Nor do we agree with Arms that the ALJ improperly cut off inquiry into Rico's dismissal of a prior FM application she filed in the name of Sequoia Broadcasting, Inc. in Woodlake, California. Arms notes that Ms. Rico testified that a company called Communications Venture Capital Group, Inc. at one time held debentures entitling it to acquire a non-voting interest in that application. Tr. 131. Arms produced no evidence, however, that that company has any interest in or relationship to the present Tierra Alta application, and in the absence of any such linkage, the ALJ reasonably limited the testimony to the ownership of Ms. Rico's instant application. Tr. 132-135. Equally meritless is Arms' contention that the ALJ did not allow questioning regarding a settlement agreement in this proceeding reached between Tierra Alta and a dismissing applicant, Media Profiles, Inc. Again, we believe the ALJ properly directed the questioning to the only relevant matter of whether the agreement contained any provision granting ownership rights to any third party (which Ms. Rico answered in the negative), but did not allow a general inquiry into the witness's familiarity with all of the terms of the agreement. Tr. 141-147. Finally, although we have responded to Arms' arguments questioning the legitimacy of Tierra Alta's integration proposal, we could have simply denied them as irrelevant because they largely "concern matters of which there is no mention in the Initial Decision . . . " *See South Carolina Radio Fellowship*, FCC 91-255, released August 13, 1991, at para. 2; *see also* 47 CFR §1.277(a) (exceptions must identify "with particularity" material errors "in the decision"), and 47 CFR §1.282(b)(2)(irrelevant exceptions may be summarily denied).

8. Turning to Arms' other exceptions, we agree with the ALJ that although both applicants are entitled to 100% quantitative integration credit, Tierra Alta's proposal is qualitatively superior and warrants a grant. Both applicants are equally enhanced for their 100% female ownership. Tierra Alta, however, is entitled to a substantial preference for its 100% minority ownership and participation, whereas Arms receives no credit in this regard. *See Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945-6 (1985); *Waters Broadcasting Corp.*, 91 FCC 2d 1261, 1266 (1982), *aff'd sub nom. West Michigan Broadcasting Co. v. FCC*, 735 F. 2d 601 (D.C. Cir. 1984). The ALJ found, and we agree, that both applicants are entitled to additional enhancement credit for their local residence, civic participation, and broadcast experience backgrounds. Arms contends that her superiority in these latter areas overcomes Tierra Alta's minority preference. We cannot agree that the differences between the applicants in these areas are substantial or, stated otherwise, that any advantage accruing to Arms would overcome Tierra Alta's significant minority preference.

9. As to local residence, Ms. Arms has lived in Las Vegas since April 1987, which date is approximately a year and half prior to the filing of her application, whereas Ms. Rico previously resided in Las Vegas in 1977 through 1978, and will reside there in the future. Arms Exh. 1; Tierra Alta Exh. 2. Thus, neither applicant offers long-term local residence of at least "several years duration," as favored by the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965) and, in fact, in terms of duration, their residences appear to be about equal. Nevertheless, because Arms' residence is current whereas Rico's predated the filing of Tierra Alta's application by approximately ten years, Arms is deemed to be slightly ahead in this area. Not much weight is added to this factor, however, because neither applicant has coupled its brief local residence with a record of substantial civic activities. *See Ronald Sorenson*, 6 FCC Rcd 1952 (1991); *Rebecca L. Boedker*, 6 FCC Rcd 2557 (1991); *Charisma Broadcasting* Corp., 6 FCC Rcd 3411, 3415 (Rev. Bd. 1991). Specifically, Ms. Rico has volunteered her time for activities concerning cystic fibrosis, particularly fund-raising. I.D., para. 12. Whatever credit she earns for these activities is offset by Ms. Arms' similar fund-raising activities on behalf of Women in Communications by manning booths at Easter Seal events. I.D., para. 2. In addition, Ms. Arms is a member of the Chamber of Commerce, has promoted voter registration and the Nevada Junior Olympics, and participated in United Blood Service. Id. Neither applicant, however, detailed the nature or extent of its principal's involvement with these organizations. Accordingly, while Ms. Arms' activities are more numerous, we have no solid basis upon which to dispute the ALJ's conclusion that the applicants' respective civic backgrounds warrant Arms only slight credit and Tierra Alta only very slight credit. *See* I.D., para. 24.

10. Similarly, the ALJ equally awarded both applicants only slight credit for their broadcast experience. We essentially agree. Ms. Rico has worked in television broadcasting since 1979 as an account executive, a local sales manager, and a national sales manager, whereas Ms. Arms' experience in radio began as a salesperson in 1964, and has included sales management, general management, and station ownership. I.D., paras. 3, 13. Thus, both applicants have a record of significant broadcast managerial experience, but even the most outstanding records in this regard have only been awarded "minor or slight" credit under Commission precedent. *See Policy Statement, supra,* at 396; *Joe L. Aldridge,* 6 FCC Rcd 994, 996 (Rev. Bd. 1991); *Beach Broadcasting Limited Partnership,* 6 FCC Rcd 885, 886-7 (Rev. Bd. 1991); *Northern Sun Corp.,* 100 FCC 2d 889, 892 (Rev. Bd. 1985). Thus, whatever advantage, if any, Arms may claim in this regard is quite modest. Because Arms' combined preference for residence and civic activities background is also small, we conclude that these credits do not equal or outweigh the significant and substantial preference awarded Tierra Alta for its 100% minority ownership. The public interest will best be served by a grant of Tierra Alta's application. In light of this result, it is unnecessary for us to reach Tierra Alta's limited exceptions which argue for a further reduction in Arms' quantitative and qualitative integration credit.

11. ACCORDINGLY, IT IS ORDERED, That the application of Tierra Alta Broadcasting, Inc. (File No. BPCT-881205KJ) for a construction permit for a new television station on Channel 15, in Las Vegas, Nevada IS GRANTED; the application of Lorraine Walker Arms (File No. BPCT-881202KK) IS DENIED; and the application of Echonet Corporation (File No. BPCT-881205KM) IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Editorial amendment of list of Office of Management and Budget approved information collection requirements contained in Part 0 of the Commission's Rules

ORDER

Adopted: September 23, 1991 Released: September 25, 1991

1. Section 3507(f) of the Paperwork Reduction Act of 1980, as amended, 44 U.S.C. 3507(f), requires agencies to display a current control number assigned by the Director of the Office of Management and Budget ("OMB") for each agency information collection requirement.

2. Section 0.408 of the Commission's Rules displays the OMB control numbers assigned to the Commission's information collection requirements. OMB control numbers assigned to Commission forms are not listed in this section since those numbers appear on the forms.

3. This Order amends Section 0.408 to remove listings of information collections which the Commission has eliminated or to add listings of new information collections which OMB has approved.

4. Authority for this action is contained in Section 4(i) of the Communications Act of 1934 (47 U.S.C. 154(i)), as amended, and Section 0.231(d) of the Commission's Rules. Since this amendment is editorial in nature, the public notice, procedure, and effective date provisions of 5 U.S.C. 553 do not apply.

5. Accordingly, IT IS ORDERED, THAT Section 0.408 of the Rules is AMENDED, effective on the date of publication in the *Federal Register*.

6. Persons having questions on this matter should contact Judy Boley at (202) 632-7513.

FEDERAL COMMUNICATIONS COMMISSION

Andrew S. Fishel
Managing Director

APPENDIX

Part 0 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 0 - Commission Organization

1. The authority citation for Part 0 continues to read:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted.

2. In 47 CFR 0.408, paragraph (b) is amended by removing the following rule sections and their corresponding control numbers:

0.408 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

* * * * *

(b) * * *

47 CFR part or section where identified and described	Current OMB Control No.
* * * * *	
15.236	3060-0324
* * * * *	
22.501(l)(10)(ii)	3060-0094
* * * * *	
25.390	3060-0164
* * * * *	
43.21	3060-0395
43.22	3060-0395
* * * * *	
73.1840	3060-0183
* * * * *	
73.3524	3060-0423
* * * * *	
76.66	3060-0375

3. In 47 CFR 0.408, paragraph (b) is further amended by adding the following rule sections and their corresponding OMB control numbers to read as follows:

0.408 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

* * * * *

(b) * * *

47 CFR part or section where identified and described	Current OMB Control No.
* * * * *	
1.402	3060-0446
1.420	3060-0394
* * * * *	
15.31(a)	3060-0428
* * * * *	
15.214(c)	3060-0436
15.233	3060-0324
* * * * *	
22.501(j)(12)	3060-0094
22.505	3060-0453
22.506	3060-0453
* * * * *	
Part 25	3060-0383
25.300	3060-0164
* * * * *	
Part 41	3060-0165
* * * * *	
64.201	3060-0439
* * * * *	
68.200(k)	3060-0436
* * * * *	
73.932	3060-0207
* * * * *	
73.1620(g)	3060-0471
* * * * *	
73.3588	3060-0423
73.3589	3060-0452
* * * * *	
74.985	3060-0465
74.1251	3060-0473
74.1263	3060-0474
* * * * *	
74.1283	3060-0466
* * * * *	
80.361	3060-0435
* * * * *	
90.713	3060-0475

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Telephone Companies Transmittal No. 402

Revisions to Tariff F.C.C. No. 4

ORDER

Adopted: September 10, 1991 Released: September 10, 1991

By the Chief, Common Carrier Bureau:

1. On June 13, 1991, the BellSouth Telephone Companies (BellSouth) filed Transmittal 402 to offer "Self-healing Multi-nodal Alternate Route Topology Ring Service" (SMARTRing). SMARTRing is a self-healing, fiber optic ring for high-capacity special access service. It consists of a series of nodes -- including central offices, customer premises, and interexchange carrier points of presence -- joined by DS3 transmission channels to form a topological ring. It is designed to survive a serious system failure, such as a cut cable, by switching to identical signals traveling in the opposite direction around the ring. Description and Justification (D&J) at 2-1.

2. SMARTRing is available in two different volume options equivalent to the capacity of either 12 or 24 DS3s. *Id.* Channel mileage is measured as the direct airline distance between each node on the designated route, including each link between any intermediate nodes. SMARTRing is available on a month-to-month basis for a minimum of 12 months and for periods of one to five years or more, with unit discounts that increase with the length of the customer's commitment. *Id.* at 2-3 to 2-9.

3. BellSouth characterizes SMARTRing as a "new service" under the local exchange carrier (LEC) price cap rules and offers a showing for both the net revenue test and the fully distributed cost (FDC) test. BellSouth states that its demand projections in these anaylses are based on surveys of its existing DS3 individual case basis customers and other potential customers who have requested DS3 proposals. On this basis, BellSouth projects that all customers in the first three years will commit to periods of five or more years, despite the availability of options for shorter commitment periods. *Id.* at 3-1 to 3-2. BellSouth's incremental net revenue analysis indicates that by the end of the third year, SMARTRing will have generated approximately $3 million on a revenue base of approximately $8.4 million. *Id.* at 3-1 to 3-6. Its fully assigned analysis indicates first-year gross revenues exceeding FDC by $7,400. *Id.*

4. US Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject or to suspend and investigate Transmittal 402. Sprint argues that the minimum requirement of 12 DS3s for SMARTRing service is unreasonably high relative to the needs of customers other than AT&T. Sprint Petition at 2-3. Sprint also maintains that a certain SMARTRing tariff provision stating that service will be offered "where facilities can be made available" is unclear and potentially discriminatory. *Id.* at 3. In addition, Sprint challenges BellSouth's measurement of channel mileage over intermediate nodes as potentially discriminatory because different customers with the same direct airline mileage may pay different rates based simply on BellSouth's choice of route. *Id.* at 3-4. Finally, Sprint contends that BellSouth's major assumption in its demand projections, that no customers can be expected to take SMARTRing for less than five years, is unsupported in the record and distorts the test results for fully allocated cost recovery. *Id.* at 4-6.

5. Metropolitan Fiber Systems, Inc. (MFS) filed a petition to suspend and investigate Transmittal 402, charging that there is a large discrepancy between BellSouth's rates for SMARTRing and its much higher rates for comparable service under generally available DS3 tariffs. According to MFS, this shows that SMARTRing rates may recover more than FDC and may violate the rate structure requirements of the *Private Line Guidelines Order*.[1] To illustrate this contention, MFS claims to construct a service similar to SMARTRing from generally tariffed DS3 elements, indicating that SMARTRing rates are 23 percent lower than the hypothetical equivalent. MFS Petition at 2-4. MFS concludes that these apparent disparities at least warrant investigation. *Id.* at 4-5.

6. Regarding SMARTRing's minimum available capacity of 12 DS3s, BellSouth states that this level was based on various customers' stated preferences and that AT&T was not the only customer expressing interest. Moreover, BellSouth claims that it cannot provide lower capacity levels at this time due to limitations of its equipment, but that it is exploring ways to do so in the future. BellSouth Reply at 2-3. With respect to the general availability clause for SMARTRing, BellSouth states that a similar provision applies to all its special access services and that a carrier may lawfully impose such reasonable limitations on its service. *Id.* at 3-5. BellSouth next replies that measurement of mileage between intermediate nodes is reasonable because SMARTRing customers are allowed to select the routes they desire. *Id.* at 5-6. Finally, BellSouth states that its conclusion that customers will demand SMARTRing only for periods of five years or more is based on actual customer contacts. *Id.* at 6-7.

7. In reply to MFS' petition, BellSouth first argues that MFS' comparative rate analysis overlooks the fact that the applicable standard for determining whether rates for new services are predatory is the net revenue test, with which BellSouth has demonstrated compliance. *Id.* at 9-10. Moreover, BellSouth maintains that the relative costs and rates of the two services under this analysis could change or even reverse depending on the scenario. *Id.* at 10. Finally, BellSouth denies that SMARTRing is somehow in violation of the *Private Line Guidelines Order* because its costs and rates are disproportionate. BellSouth states that SMARTRing has greater functionality at lesser costs than the MFS hypothetical because of greater technological efficiency and similar factors. *Id.* at 10-11.

8. The Common Carrier Bureau has reviewed BellSouth Transmittal 402 and related pleadings. We conclude that no compelling argument has been presented that the tariff is so patently unlawful as to warrant rejection, and that an investigation is not warranted at this time.

9. Accordingly, IT IS ORDERED that the petitions to reject, suspend, or investigate BellSouth Telephone Companies Tariff F.C.C. No. 4, Transmittal No. 402, filed by

US Sprint Communications Company Limited Partnership and Metropolitan Fiber Systems, Inc., ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] Private Line Rate Structure and Volume Discount Practices, 97 FCC 2d 923, 948 (1984).

Before the
Federal Communications Commission
Washington D.C. 20554

PUBLIC NOTICE

Released: August 14, 1991

COMMISSION CLARIFIES REQUIREMENTS FOR REPORTS TO BE FILED BY OPERATOR SERVICE PROVIDERS (CC Docket 90-313, Phase II)

On April 22, 1991, the Common Carrier Bureau released an Order directing interstate operator service providers (OSPs) to file periodic reports concerning their rates, consumer complaints about their service, and certain costs that they incur in providing operator services to the public.[1] The first of these reports was to be filed June 21, 1991 and subsequent reports must be filed September 23, 1991, March 23, 1992, and September 21, 1992. This public notice clarifies both substantive and procedural requirements for the filing of these reports. In addition, the attachment to this public notice contains a suggested model for OSP reports. OSPs are not required to employ this model in preparing their reports. However, this model presents all of the required information concisely and its use will reduce the likelihood that an OSP's report will omit any required data item. OSP reports should omit the explanatory notes included in the model attached to this public notice.

Who Must File: All providers of interstate operator services, as defined by the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA), 47 U.S.C. § 226(a), must file the reports required by the Bureau's *OSP Reporting Requirements Order*.

IMPORTANT: Operator Service Providers that did not file reports as required on June 21, 1991 must file their first reports and their second reports not later than September 23, 1991. OSPs that do not comply with this requirement will be subject to sanctions under the Communications Act including, but not limited to, the assessment of monetary forfeitures. OSPs that come into compliance with the terms of the *OSP Reporting Requirements Order* by September 23, 1991 will not face enforcement action for their prior violations of the requirements of that order.

Filing Dates: The *OSP Reporting Requirements Order* directed OSPs to file their first report not later than June 21, 1991. This report was to contain rate, complaint, and cost information from the period January 1, 1991 through April 30, 1991. The second OSP report must be filed not later than September 23, 1991 and shall contain rate and complaint information from the period May 1, 1991 through July 31, 1991 and cost information from the period January 1, 1991 through July 31, 1991. The third OSP report must be filed not later than March 23, 1992 and shall contain rate and complaint information from the period August 1, 1991 through January 31, 1992 and cost information from the period January 1, 1991 through January 31, 1992. The fourth and final OSP report must be filed not later than September 21, 1992 and shall contain rate and complaint information from the period February 1, 1992 through July 31, 1992 and cost information from the period January 1, 1991 through July 31, 1992.

Content of Rate Report: The first section of each OSP report must contain a compilation of the OSP's rates and charges for operator services. The compilation of rates and charges must state the rate for each rate element, both usage sensitive and fixed charges, that is in effect at the close of the reporting period. In addition, the report must state the percentage change in each rate element since January 1, 1991 (if the OSP did not file a report on June 21) or the date of the last report, whichever is more recent. Each OSP must display its rates for each rate element, and the percentage change in each rate element, even if there has been no change in its rates since the prior reporting period. OSPs are reminded that TOCSIA requires them to file informational tariffs and to update these tariffs whenever any information contained therein, including rates, changes.

The rate report must also include a price out, in tabular form, of ten sample calls. Each OSP should use its own rates and charges to calculate the total charges that would apply to each of the sample calls contained in Attachment B to the Bureau's *OSP Reporting Requirements Order*. A copy of Attachment B is included in the attachment to this public notice. As the Bureau stated in that Order, OSPs may include charges for other calls in addition to the sample calls listed in Attachment B. However, each OSP must provide the information required by Attachment B to the *OSP Reporting Requirements Order* and may not deviate from the format of Attachment B. In other words, OSPs may not alter the Call Type, Time of Day, Length of Call, or Distance specified in Attachment B to the *OSP Reporting Requirements Order*. If the OSP's tariff specifies a range of rates for a particular call, the range of rates should be stated in the OSP's rate compilation and in the price out required by Attachment B.

Content of Complaint Report: The second section of the OSP's report must contain a statement of the number of complaints the OSP has received each month since January 1, 1991, or the end of the last reporting period, whichever is more recent. The complaint report must include all complaints of which the OSP becomes aware in the ordinary course of its business. This includes both complaints that the OSP receives directly from consumers and complaints filed with the Federal Communications Commission or other Federal, state, or local governmental bodies. Complaint reports must also state the incidence of complaints, *i.e.*, the number of complaints received divided by the number of calls attempted by consumers during each month covered by the report.

OSPs must also categorize complaints on the basis of the subject matter of the complaint. The *OSP Reporting Requirements Order* specified six categories: (1) rate charged; (2) blocking of access to carriers other than the presubscribed carrier; (3) "call splashing;" (4) call quality; (5) failure to comply with other statutory requirements or Commission rules; and (6) other complaints. The com-

[1] Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II, *Order*, DA 91-523, released Apr. 22, 1991 (Com. Car. Bur.) (*OSP Reporting Requirements Order*).

plaint report must contain a total, for each month and for the period as a whole, of the number of complaints in each of these six categories. OSPs must also report any other investigations or inquiries relating to their operations including, but not limited to, law suits, investigations by state or Federal authorities, and new legislation.

Content of Cost Report: The third section of the OSP's reports must contain information concerning the OSP's cost of providing service. The cost report must state the OSP's total capital investment at the close of the reporting period. The cost report must also state the OSP's total expenses and total revenues for the period from January 1, 1991 to the close of the reporting period. In addition, the cost report must separately state five specific expense items: (1) commissions and surcharges paid by the OSP; (2) billing costs; (3) validation costs; (4) total salaries and benefits paid to officers and other employees; and (5) all other expenses. These specific expense items must also be stated for the period from January 1, 1991 to the close of the reporting period.

As the Bureau stated in the *OSP Reporting Requirements Order*, the OSPs' cost information is entitled to confidentiality pursuant to Section 0.457(d) of the Commission's Rules, 47 C.F.R. § 0.457(d), to the extent that it is not already made publicly available. The rate and complaint reports, in contrast, are not entitled to confidentiality.

Filing Procedures: OSPs must file both public and nonpublic copies of their reports. OSP reports should be captioned Operator Service Provider Report, CC Docket No. 90-313, Phase II and must be clearly labelled either "PUBLIC" or "NON-PUBLIC." Each OSP should file an original and four copies of both its public report and of its non-public report with the Secretary, Federal Communications Commission, Room 222, 1919 M St. NW, Washington, D.C. 20554. The non-public report will be maintained for use by Commission staff only and must therefore contain all information required by the *OSP Reporting Requirements Order*. The public report should be identical to the non-public report except that it shall omit the confidential cost information.

For further information concerning general questions or legal matters, contact Kelly Cameron, Tariff Division (202) 632-6917.

For further information concerning the filing of informational tariffs, contact Judith Nitsche or Charles Demek, Tariff Review Branch (202) 632-5550.

For further information concerning the filing of reports, contact Charles Demek, Steven Funkhouser, or James Lichford, Tariff Review Branch (202) 632-5550.

FEDERAL COMMUNICATIONS COMMISSION

ATTACHMENT

Models of Reports required by OSP Reporting Requirements Order

RATE REPORT MODEL [1]

COMPANY: ABC Communications Corporation
ADDRESS: 1111 S. Whales Street
Suite 207
Bering, AZ 55555
PHONE: (701) 457-8799
DATE: September 1991

RATES FOR PERIOD [DATE] THROUGH [DATE]

USAGE SENSITIVE CHARGES

	RATES AS OF:[2]		RATES AS OF:[3]		PCT CHANGE[4]	
RATE MILEAGE	FIRST MIN	ADD'L MIN	FIRST MIN	ADD'L MIN	FIRST MIN	ADD'L MIN
1-10	$.40	$.40	$.35	$.35	-12.5%	-12.5%
11-22	$.40	$.40	$.35	$.35	-12.5%	-12.5%
23-55	$.40	$.40	$.35	$.35	-12.5%	-12.5%
56-124	$.40	$.40	$.35	$.35	-12.5%	-12.5%
125-292	$.40	$.40	$.32	$.32	-20%	-20%
293-430	$.40	$.40	$.32	$.32	-20%	-20%
431-925	$.40	$.40	$.32	$.32	-20%	-20%
926-1910	$.40	$.40	$.45	$.45	+12.5%	+12.5%
1911-3000	$.40	$.40	$.45	$.45	+12.5%	+12.5%
3001-4250	$.40	$.40	$.45	$.45	+12.5%	+12.5%
4251-5750	$.40	$.40	$.45	$.45	+12.5%	+12.5%

FIXED SERVICE CHARGES [1]

	RATES AS OF:[2]	RATES AS OF:[3]	PCT CHANGE[4]
Calling Card	$2.50	$2.80	+12%
Collect	$2.50	$2.80	+12%
Credit Card	$2.75	$2.75	0%
Person to Person	$3.50	$3.75	+ 7%
Third Party	$4.25	$3.75	-11.7%
Operator Assisted	$2.80	$2.80	0%

AGGREGATOR SURCHARGES

TARIFFED		CURRENT		PERCENT CHANGE
FIXED	VARIABLE	FIXED	VARIABLE	
N/A	$0.50-$2.50	N/A	$1.00-$3.00	(+100%)-(+20%)

[1] These reports have been filled out for illustrative purposes. If tariff has multiple rate and fixed charges schedules, provide report for each schedule. If this filing covers multiple periods, provide separate report for each period.
[2] Enter January 1, 1991 or first day of reporting period.
[3] Enter last day of reporting period.
[4] Enter % only for a single reporting period.

SAMPLE CHARGE REPORT MODEL

COMPANY: ABC Communications Corporation
ADDRESS: 1111 S. Whales Street
Suite 207
Bering, AZ 55555
PHONE: (710) 457-8799
DATE: September 1991

RATES FOR PERIOD [DATE] **THROUGH** [DATE]

HOTEL TRAFFIC (20 % OF TOTAL) [1]

% of Hotel[2]	Call Type	Time of Day	Length of Call[4]	Distance Rate Band	% of Call Type[6]	Rate Range[7]
95%	0+Card	D	8 min	56-1910	10	5.60-6.40
	0+Card	E	8 min	56-1910	85	5.60-6.40
	0+Card	N	8 min	56-1910	5	5.60-6.40
5%	0+Coll	E	8 min	56-1910	100 [5]	5.80-6.60

PUBLIC TRAFFIC (80% OF TOTAL) [1]

% of Pub[3]	Call Type	Time of Day	Length of Call[4]	Distance Rate Band	% of Call Type[6]	Rate Range[7]
90%	0+Card	D	8 min	56-1910	30	5.60-6.40
	0+Card	E	8 min	56-1910	65	5.60-6.40
	0+Card	N	8 min	56-1910	5	5.60-6.40
10%	0+Coll	D	8 min	56-1910	40	5.80-6.60
	0+Coll	E	8 min	56-1910	55	5.80-6.60
	0+Coll	N	8 min	56-1910	5	5.80-6.60

NOTE: Hotel traffic should include only traffic originating from hotels and motels. Traffic originating from all other locations should be reported in Public Traffic.
[1] Sum of % of hotel and public traffic should equal 100%.
[2] Sum of % of all hotel categories should equal 100%, if OSP provides hotel service.
[3] Sum of % of all public categories should equal 100%, if OSP provides public service
[4] Length of call must be 8 minutes. Do not substitute any other call length.
[5] Enter 100% if any calls are reported for 0+ Collect (E).
[6] Sum of % within call types must equal 100%.
[7] **THIS RATE SHOULD BE THE TOTAL CHARGE FOR A CALL INCLUDING APPLICABLE USAGE SENSITIVE CHARGES, FIXED CHARGES, AGGREGATOR SURCHARGES AND ANY OTHER COMMISSIONS, ETC.** First rate must be for 8 minutes and 56 miles. If multiple rate schedules exist, price at lowest rate for 56 miles and include the fixed charges, aggregator surcharges and commissions that apply to that rate schedule. Second rate must be for 8 minutes and 1910 miles. If multiple rate schedules exist, price at highest rate for 1910 miles and include the fixed charges, aggregator surcharges and commissions that apply to the rate schedule.

COMPLAINT REPORT MODEL

COMPANY: ABC Communications Corporation
ADDRESS: 1111 S. Whales Street
SUITE 207
Bering AZ 55555
PHONE: (701) 457-8799
DATE: September 1991

COMPLAINTS FOR PERIOD [DATE] THROUGH [DATE]

CATEGORY	JANUARY TO FCC	JANUARY TO STATE	JANUARY TO CO.	FEBRUARY TO FCC	FEBRUARY TO STATE	FEBRUARY TO CO.
Rates Charged	2	3	0	2	5	1
Block Access	1	0	1	0	2	2
Call Splashing	1	0	1	0	1	1
Call Quality	7	4	3	5	3	0
Non-Compliance [1]	0	0	0	0	0	1
Other	14	5	4	26	8	2
Subtotal [2]	46			59		
	MARCH			APRIL		
Rates Charged	0	0	1	1	5	3
Block Access	0	0	2	1	1	2
Call Splashing	0	0	2	0	0	1
Call Quality	7	5	3	8	7	0
Non-Compliance [1]	1	0	0	0	1	1
Other	30	12	5	17	20	11
Subtotal [2]	68			79		

A. TOTAL FCC COMPLAINTS 123

B. TOTAL STATE COMPLAINTS 82

C. TOTAL COMPANY COMPLAINTS 47

D. TOTAL COMBINED COMPLAINTS FOR REPORTING PERIOD 252

E. TOTAL COMBINED CALLS FOR REPORTING PERIOD 150,000

F. INCIDENCE OF COMPLAINTS FOR ENTIRE REPORTING PERIOD (LINE D/E) 00168

G. OTHER INVESTIGATIONS [3]

[1] Complaints charging failure to comply with other statutory requirements or FCC rules.

[2] Subtotals tally all complaints in all six categories received in a given month by the FCC, state authorities, and the reporting OSP.

[3] List other investigations or inquiries relating to the OSP's operations including, but not limited to, law suits, investigations by state or Federal authorities, and new legislation. List individually on a separate sheet of paper.

COST REPORT MODEL

COMPANY: ABC Communications Corporation
ADDRESS: 1111 S. Whales Street
Suite 207
Bering, AZ 55555
PHONE: (701) 457-8799
DATE: September 1991

COSTS FOR PERIOD [DATE]	THROUGH [DATE]
Total Capital Investment [1]	$ 200,000
Total Expenses	$ 60,000
Total Revenue	$ 75,000
Commissions and Surcharges	$ 8,000
Billing Costs	$ 9,000
Validation Costs	$ 1,500
Salary Expenses and Other Benefits	$ 13,500
All Other Expenses	$ 28,000

[1] Total capital investment must reflect all capital investment the company has made for the provision of operator services and not only additions made during the period covered by the report. All other cost data must be stated for the period January 1, 1991 to the close of the reporting period.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

EVERGREEN BROADCASTING COMPANY Evergreen, Colorado et al.	MM DOCKET NO. 84-397 through MM DOCKET NO. 84-412

For Construction Permit
for a New FM Station

MEMORANDUM OPINION AND ORDER

Adopted: August 23, 1991; Released: September 20, 1991

By the Commission:

1. Ten applicants seek a construction permit for a new FM station in Evergreen, Colorado. In an initial decision, the ALJ disqualified Lord Broadcasting on a short-spacing issue, found the other applicants fully qualified, and granted Group Y Communications Investment Partnership's application based on its superior integration proposal. *Payne Communications, Inc.*, 86D-3 (January 23, 1986). Except for Interstate Broadcasting System, which proposed no integration, all of the applicants proposed 100% integration. The ALJ fully credited the integration proposals of Group Y and Evergreen Communications Corporation, partially credited those of Evergreen Radio Inc. (50%), Janet Hunter Driggs (51%), and Evergreen Broadcasting Corporation II (47%), and completely discredited those of Evergreen Broadcasting Company, Best-Evergreen Broadcasting, and Evergreen Ventures, Inc.

2. The Review Board affirmed Lord's disqualification, but selected ERI, rather than Group Y, as the comparatively superior applicant. *Payne Communications, Inc.*, 1 FCC Rcd 1052, 1052-54 ¶¶ 4-10 (Rev. Bd. 1986). In so doing, it agreed with the ALJ's award of partial integration credit to ERI, Driggs, and Evergreen II, and with the award of no integration credit to EBC, Best, and EVI. But the Board also concluded that Group Y's and ECC's proposals did not merit any integration credit. All ten applicants seek Commission review of the decision favoring ERI.

3. While the applications for review and various related pleadings were pending before the Commission, the parties entered into a settlement agreement with a non-party, Susquehanna Radio Corporation. The settlement provided for the grant of ERI's amended application, and the dismissal of the other nine applications. Initially approved by the General Counsel under delegated authority, the settlement agreement lapsed when its approval did not become final by July 11, 1990.[1] On November 26, 1990, the General Counsel granted ERI's Motion to Withdraw the settlement, reinstated the previously dismissed applications, and afforded the parties a further opportunity to file comments on the applicants' comparative qualifications and on ERI's proposed retention of the Mount Morrison transmitter site specified in connection with the lapsed settlement agreement. All ten applicants seek permission to amend to the Mount Morrison site and to incorporate the engineering materials prepared to effectuate the settlement.

4. Based upon our review of the pleadings before us,[2] we agree with the Board's resolution of the short-spacing issue against Lord, but we find for the reasons set forth below that ECC is the comparatively superior applicant.[3] ECC's reinstated application specifies a transmitter site, located on Doublehead Mountain, that is no longer available. Thus, its amendment to the Mount Morrison site is supported by good cause, as are the amendments submitted by the other eight applicants also specifying the Doublehead Mountain site. We therefore accept those nine amendments, and grant ECC's amended application.[4] But we will reject Lord's amendment. Lord has not lost its current site and thus it lacks good cause to amend to the Mount Morrison site.

A. STANDARD COMPARATIVE ISSUE

5. We turn first to the standard comparative issue. The extent to which the applicants will integrate ownership into management is the dispositive criterion under that issue.[5] In this regard, we affirm the award of no credit to EVI, EBC, and Best, and only partial integration credit to Driggs, ERI,[6] and Evergreen II.[7] But we conclude that ECC's proposal, completely discredited by the Board, is entitled to 100% credit, and that Group Y's proposal, also discredited by the Board, merits no more than 40% credit. ECC, the only applicant with 100% full-time integration credit, is the clear winner. Its application will therefore be granted.

6. *ECC*: We agree with the ALJ that ECC, organized as a general partnership, deserves 100% credit for the proposed integration of all three partners: Elizabeth Siebert (51%), her husband Keith Siebert (39%), and Patricia Knous (10%).[8] The ALJ awarded ECC 100% quantitative integration credit, but concluded that ECC's integration proposal was qualitatively inferior to that of Group Y (*Initial Decision* at ¶¶ 155-58, 167-71). The Board disagreed, holding that ECC's integration proposal did not deserve any quantitative credit because its oral partnership agreement, which was never reduced to writing, was too tenuous to merit any integration credit (1 FCC Rcd at 1055-56 ¶¶ 19-23). However, Commission precedent at the time these applications were filed did not require written documentation of organizational structure on the B cut-off date.[9] Uncontroverted evidence, in the form of certified and sworn written submissions as well as sworn oral testimony, establishes the existence of the partnership. That the partnership agreement was never put in writing does not, without more, undermine the reliability of that evidence. As it appears that the owners have made decisions by mutual consent rather than according to their respective partnership shares, however, they should be regarded as equal partners. *See, e.g., Marlin Broadcasting Corp.*, 5 FCC Rcd 5751, 5752-53 & n.15 (1990). This does not affect the ultimate outcome of this proceeding: ECC is the only applicant entitled to 100% combined quantitative integration credit, and thus the respective ownership interests of the individual partners are not decisionally significant.

7. *Group Y*: Group Y, a limited partnership with six 10% limited partners, proposes to integrate its two 20% general partners, Samuel and Anna Yacovazzi. Under *Anax Broadcasting*, 87 FCC 2d 483, 488 ¶ 15 (1981), the interests of limited partners that are passive investors having no authority to control the licensee are disregarded for integration purposes. As set forth below, we agree with the Board that Group Y's partnership agreement provides insufficient insulation of the general partners from influence by the limited partners to meet that basic standard. We therefore attribute the limited partners' interests. Thus, Group Y merits no more than 40% quantitative credit for the Yacovazzis' proposed integration.[10]

8. The Board is correct that Group Y's partnership agreement does not fully comply with *Ownership Attribution*, 58 RR 2d 604, 619-20 ¶ 49 (1985), which specified that the partnership agreement must prohibit or severely restrict a limited partner's right to remove a general partner. Despite Group Y's claim, those standards, adopted after Group Y executed its partnership agreement, apply to all pending cases. *Cotton Broadcasting*, 4 FCC Rcd 1781, 1784 ¶ 23 (1989).[11] While we have allowed applicants to amend to supply subsequently adopted insulation standards, such amendments, if filed after the B cut-off date, must be supported by good cause, as required by section 73.3522(b) and *Erwin O'Conner*. Good cause exists only if the limited partners' rights under the original agreement "are not so extraordinary as to suggest that the limited partnership agreement was a sham or that it deprived the general partners of their exclusive control over the applicant." *Doylan Forney*, 5 FCC Rcd 5423, 5425 ¶ 15 (1990).

9. Group Y's post B cut-off date amendment conforming the partnership agreement to later insulation standards is not supported by good cause because the original partnership agreement did not comply with the requirements of *Anax*. Group Y's original partnership agreement, while expressly barring the limited partners from participating in the management of the applicant, provides that limited partners may remove a general partner without specifying that such removal may only be for cause (1 FCC Rcd at 1054-55 ¶ 15). In addition, Group Y concedes that the limited partners may, by majority vote, sell all or substantially all of the assets of the partnership, amend the agreement, or dissolve the partnership. We are not persuaded by the claim that these rights do not enable the limited partners to exert control over the applicant because their exercise is subject to several extraordinary measures, including a declaratory ruling by a court, an opinion by the IRS, or an opinion from legal counsel. In our view, these measures, primarily designed to maintain the limited partners' limited liability for partnership debts, afford little deterrence against the exercise of such permissive powers. Group Y does not dispute that Colorado law, pertinent to the limited liability question, provides that limited partners do not forfeit their insulation from liability by voting for the removal or appointment of a general partner.

10. In *Doylan Forney*, 5 FCC Rcd at 5424 ¶ 8, we held that limited partners who, without the concurrence of the general partners, may dissolve the partnership and sell some or all of the partnership's assets have more than the purely passive interest necessary to avoid attribution under *Anax*. The agreement in that case permitted the limited partners to remove a general partner in only four situations. *Id.* Nevertheless, the integration proposal was deemed "defective under the *Anax* doctrine from the time of its execution," and a post B cut-off date amendment conforming the agreement to the *Ownership Attribution* standards was rejected.[12] *Id.* at 5425 ¶¶ 15-16. The partnership agreement in this case not only permits dissolution by the limited partners but also gives them unlimited power to take that action, and thus it does not meet the basic *Anax* standard. In view of that circumstance, Group Y may not cure that initial deficiency by amending to comply with the subsequent standards. Accepting such an amendment under these circumstances would, as we held in *Doylan Forney*, upgrade Group Y's comparative position to the detriment of the other parties to this proceeding. The equity held by Group Y's six limited partners must therefore be attributed to the applicant for integration purposes.

11. *EVI, EBC, and Best*: The integration proposals of EVI, EBC, and Best merit no comparative credit in accord with the comprehensive statement concerning defective integration proposals in *Royce International Broadcasting*, 5 FCC Rcd 7063, 7064 ¶ 10 (1990). There, the Commission restated existing case law dealing with two-tiered entities (such as a limited partnership or a corporation with both voting and non-voting stockholders), noting that there is "no basis for awarding any integration credit at all . . . where the applicant has failed to demonstrate reliably that a nominally controlling principal (i.e. a general partner or a voting stockholder) will in fact exercise control or has otherwise left fundamental uncertainty about the true nature of its organizational structure." Thus, the Commission said that it would not hesitate to discredit totally the proposed integration of a nominally controlling owner if: "(1) a principal holding a small or passive interest (rather than the supposedly active owner) is in a position to dominate the applicant's affairs; (2) a person with no disclosed ownership interest (again, rather than the supposedly active owner) is in a position to exercise significant control over the applicant; or (3) the assertedly active principal has exercised little, if any, significant control over the applicant, and has not shown any real prospect of doing so."

12. We note that the facts that will lead to a conclusion that an integration proposal is fatally defective under *Royce* ¶ 10 necessarily vary from case to case. We evaluate the reliability of such proposals on a case-by-case basis to determine whether the record mandates a conclusion that integration credit must be altogether withheld. For the reasons set forth in paragraphs 14-16 below, we generally rely on the post-formation record unless that record does not reliably establish that the nominally controlling owners will exercise exclusive control. In that event, we consider the entire record, that is the totality of the facts concerning the principals' pre- and post-formation activities, as well as the circumstances surrounding the applicant's formation. By way of illustration, we note that the following considerations are relevant under *Royce* ¶ 10 in evaluating the reliability of an applicant's ownership structure: (1) the extent to which the post-formation record reflects that, following the applicant's organization as a two-tiered entity under which the nominally controlling owners are to have exclusive managerial control, those owners either have minimal, ministerial roles or defer completely to the purportedly passive owners who, in turn, continue to exercise managerial control; (2) the extent to which the nominally controlling owners did not formulate, or at the very least become familiar with,

crucial aspects of the applicant's proposal; and (3) the extent to which the applicant was formed in a manner that is contrary to sound business judgment (i.e., whether the principals entered into a legally binding arrangement without meeting or knowing one another, without thoroughly investigating each others' financial, character, and business backgrounds, without carefully considering their respective duties and rights under that agreement, or without seeking to negotiate different or better terms). We note further that a determination to withhold all integration credit under *Royce* ¶ 10 may be further supported by fact patterns which, if standing alone, would only warrant attribution of all passive interests under *Royce* ¶ 9. These include, but are not limited to: (1) the extent to which the ownership documents insufficiently insulate the nominally controlling owner from undue influence by any of the purportedly passive owners, or otherwise accord them authority that belies their formal status as mere passive investors (i.e., non-voting stockholders or limited partners); and (2) the extent to which the principals have failed to adhere to the ownership documents, and therefore cannot be expected to follow those documents in the future. With this background in mind, we turn to an examination of these three applications.

13. *EVI*: Organized as a corporation, EVI proposes to integrate all four stockholders, Jean P. Mann (45%), Jacob A. Williams (24.5%), Lucille M. Martinez (24.5%), and Cynthia C. Marschner (6%). This proposal merits no integration credit because the applicant has not reliably demonstrated -- based on either the post-formation record, standing alone, or the entire record -- the extent to which the four nominal owners will actually exercise control. The record reflects that three non-owners, who have marital, social, and/or business ties with each of the nominal owners, who originally intended to file for the station, and who plan to work in full-time non-managerial positions at the station, have played a major role in prosecuting the application. Thus, while nominal owners Cynthia Marschner and Judy Mann also played significant roles in the prosecution of the application and Mrs. Mann may have more (non-broadcast) managerial experience than the three outsiders, the three non-owners will be in a position to exercise significant, continuing control over the applicant.[13]

14. Citing *Victory Media, Inc.* and *Royce*, EVI argues that pre-formation activities are not a basis for discrediting an applicant's ownership structure. But in *Royce* at n.13, we noted that "[i]n *Coast TV*, 5 FCC Rcd 2751 (1990), the Commission reaffirmed the principle set forth in *KIST Corp.*, 102 FCC 2d 288 (1985), that it is appropriate to examine the totality of facts in determining whether an applicant's ownership proposal is *bona fide*. *Id.* at 2753 n.4." In this respect, *Coast TV* expressly overruled *Victory* and reiterated the relevance of such activities under *KIST*. Thus, to the extent that EVI cites *Victory* for the proposition that pre-formation activities are not probative of who will control the ongoing business, *Coast TV* makes clear that pre-formation involvement by purportedly passive principals remains a pertinent consideration in evaluating the reliability of an applicant's ownership structure. Indeed, citing *Metroplex Communications, Inc.*, 5 FCC Rcd 5610, 5612 ¶¶ 14-21 (1990), we explained in *Poughkeepsie Broadcasting Limited*, 6 FCC Rcd 2497, 2499 n.5 (1991), that "the pre-formation record [may] raise[] questions that, standing alone, could . . . justif[y] rejecting the applicant's proposal."

15. In doing so, we did not mean to suggest, however, that we would discredit a proposal under *Royce* ¶ 10 based solely on the pre-formation record without regard to the post-formation record or that a principal's pre-formation involvement precludes him from ever being considered passive for comparative purposes. We have long recognized that "the predictive implication[] of [the purportedly passive principals'] earlier activities in . . . corporate planning and decision-making . . . is conjectural and does not *itself* establish any continuing involvement on their part." *Cleveland Television Corp.*, 91 FCC 2d 1129, 1132 ¶ 6 (Rev. Bd. 1982), aff'd, *Cleveland Television Corp. v. FCC*, 732 F.2d 962 (D.C. Cir. 1984) (emphasis added).

16. Thus, where an applicant, having modified its ownership structure to provide that a previously active owner now has a passive, non-attributable role, "thereafter adheres to that changed ownership structure without exception, the Commission ordinarily has reasonable assurance that the once active owner will not exercise any control or influence over the management of the ongoing licensee." *Coast TV*, 5 FCC Rcd at 2753 ¶ 16 & n.3. But "[t]his reasonable assurance can be undermined . . . when the totality of facts otherwise indicates that an applicant's ownership proposal is not *bona fide*. *Id.* at n.4. In other words, the principals' post-formation activities are generally better evidence of who will control the ongoing business than the principals' pre-formation activities or the circumstances surrounding the applicant's formation. However, where that post-formation record does not reliably demonstrate that the nominally active owners will exclusively control the ongoing business or leaves fundamental uncertainty about the applicant's control, we consider the entire record, which includes the pre- and post-formation records as well as the manner in which the applicant was formed, in evaluating the reliability of the ownership structure.[14]

17. Given the outsiders' proposed positions at the station, their long-standing relationships with the nominal owners, and their continued post-formation involvement, we are unpersuaded by the post-formation record that EVI's stockholders will exclusively control the ongoing business. Thus, it is appropriate to consider the entire record rather than just the post-formation record. Based on the entire record (*i.e* the parties' *pre-* and *post*-formation conduct as well as their longstanding relationships), we are not persuaded that the nominal owners will control the licensee as represented. *See Royce*, 5 FCC Rcd at 7064 ¶ 10. Non-owners Frederick Mann, Richard Marschner, and Charles Samson have made no capital contributions to EVI, but unsecured, interest-free loans extended by Samson to friends Martinez and Williams enabled them to buy into EVI. Despite the considerable broadcast experience and the initial interest in applying for the station on the part of Messrs. Mann, Marschner, and Samson, all three will resign their current broadcast positions to hold non-managerial positions at the proposed station. Williams, the only nominal owner with any broadcast experience, will serve as program director. But his pre- and post-formation activities, as well as those of Lucille Martinez, have not been significant.[15]

18. The outsiders' greater familiarity with broadcasting is pertinent in this case in determining the likelihood that the proposed ownership structure accurately reflects how control will be exercised. Given the outsiders' longstanding relationships with the nominal owners (i.e.

as husbands and close friends), their extensive broadcast experience, their original interest in the applying for the station, and their intention to resign their managerial jobs for low-level posts should EVI prevail, we are not persuaded that the outsiders will be mere employees exercising no significant managerial or policymaking responsibility.[16] Indeed, interpreted in its most favorable light, the record reflects that thus far the nominal owners, while involved or at least aware of matters affecting the application, (*Initial Decision* at ¶¶ 79-84, 140-44, 147), nevertheless deferred to the expertise of the non-owners (who continued to be involved even after deciding not to apply for the station and even after EVI's formation).[17] There is no basis for finding that they will not continue to do so in the future. Thus, given the outsiders' pre- and post-formation activities, EVI has not reliably demonstrated the extent to which its nominal owners, as opposed to outsiders, will exercise control over the applicant, and no credit is due under *Royce*, 5 FCC Rcd at 7064 ¶ 10, for the nominal owners' proposed integration.[18]

19. *EBC*: EBC is a limited partnership with three general partners (51% combined equity) and one limited partner, Paul Tunis (49% equity). Tunis conceived EBC's formation, recruited the three general partners, and is committed to financing the entire cost of filing and prosecuting the application and of constructing and operating the station. Emphasizing Tunis' pre-organizational activities and his retention of vital elements of control under the partnership agreement, the Board determined that the proposed integration of EBC's three female general partners deserved no comparative credit (1 FCC Rcd at 1059-60 ¶¶ 38-39).

20. Here, the record reflects post-formation involvement by Tunis that belies his formal status as a "limited" partner. Under these circumstances, that record affords insufficient assurance that the three "general" partners will have exclusive managerial control of the ongoing business. In determining whether EBC's proposal merits any integration credit, we must therefore consider the entire record, rather than only the post-formation record. For the reasons set forth below -- EBC's formation in a manner that is irreconcilable with sound business judgment, as well as Tunis' retention of vital elements of control under the partnership agreement, and the parties' departure from that agreement -- we find that EBC's organization as a limited partnership does not accurately depict the manner in which control will be exercised. *Metroplex*, 5 FCC Rcd at 5613 n.8. Thus, we have no basis for awarding any comparative credit for the proposed integration of EBC's nominal general partners under *Royce* ¶ 10. In discrediting EBC's integration proposal, we note that, as indicated in paragraphs 14-16 above, pre-formation activities by a purportedly passive individual remain appropriate considerations in evaluating the reliability of an applicant's ownership proposal. *See Poughkeepsie*, 6 FCC Rcd at ¶ 7 & n.5 (1991), citing *Metroplex*, 5 FCC Rcd at 5612 ¶¶ 14-21.

21. Apart from the language in the partnership agreement, which EBC urges is not a basis for attributing Tunis' 49% equity interest,[19] EBC objects to the Board's reliance on Tunis' pre-formation activities in concluding that EBC's ownership structure was not *bona fide*. EBC asserts that there is no reason to believe that Tunis will try to influence station management or that the general partners would tolerate such interference by Tunis. In this regard, it relies on the facts that the nominal owners are local professionals with broadcast and general managerial experience whereas Tunis has no broadcast experience or local ties. But as we reaffirmed in *Royce*, 5 FCC Rcd at 7063-64 ¶¶ 7-8, the applicant has the burden of demonstrating the overall reliability of its integration proposal. EBC has not met that burden on the critical issue of whether the limited partner will entrust exclusive managerial control to the three general partners. *Id.* at 7064 n.10.

22. The record reflects that the general partners had no previous relationship with Tunis, were located by a research group hired by Tunis to find minority group members who were female and who were capable of operating a broadcast station full-time (*Initial Decision* at ¶¶ 31-32). Each met Tunis only once before signing the partnership agreement. Notwithstanding their local ties and broadcast experience, it is not credible that Tunis, who is responsible for funding the applicant, would retain only 49% equity and give exclusive managerial control to three strangers, who have no further investment obligation to EBC beyond their initial $100 contribution.[20] That Tunis has apparently "given away the store" reinforces our conclusion, infra., that he will not cede exclusive managerial control to the general partners but will be in a position to dominate EBC's affairs.[21] Cf. *KIST Corp.*, 102 FCC 2d 288, 292 ¶ 8 (1985).[22]

23. EBC alleges, however, that its three general partners were active in prosecuting its application. But, as the ALJ found (*Initial Decision* at ¶¶ 33-35), it was Tunis who advocated the use of a limited partnership form of business, selected EBC's (local and FCC) counsel, hired the engineer, was involved in choosing the antenna site, and authorized preparation of the engineering exhibits. Not only did Tunis hire attorneys, engineers, and an escrow agent that he had used in prosecuting other broadcast applications, he also prepared the financial proposal and an initial draft of the partnership agreement before selecting the general partners. Nor did Tunis' involvement in the prosecution of the application cease with the signing of the partnership agreement. While fully apprised of these activities, the general partners nevertheless relied on Tunis to continue prosecuting the application even after formation of the partnership. Indeed, they claimed to have been too busy with their current jobs and interests to pursue the application (*Initial Decision* at ¶ 126).[23]

24. In other words, it was the allegedly passive limited partner, not the assertedly active general partners, who was largely responsible for the prosecution of EBC's application both before and after its formation as a limited partnership. This, as well as the casual manner in which EBC was formed, Tunis' retention of critical indicia of control under the partnership agreement, and the parties' failure to adhere to the terms of that agreement,[24] persuades us that EBC's organization as a limited partnership does not accurately reflect how control will be exercised, and that nominally passive Tunis is in a position to exercise significant control over the applicant. Thus, we have no basis for awarding EBC any credit for the proposed integration of the three so-called general partners under *Royce* at ¶ 10.

25. *Best*: Initially a partnership with two general partners, Terry (51%) and Robert Buenzle (49%), Best is now a two-tiered corporation. It seeks 100% credit for the proposed integration of Terry Buenzle, its 60% voting stockholder. Her husband, Robert, now a 40% non-voting stockholder, will not be integrated. Neither has broadcast

experience, but Robert is a communications attorney and she has worked as personnel director. The post-formation record affords no basis for crediting Terry Buenzle's proposed integration as full-time general manager under *Royce*, 5 FCC Rcd at 7064 ¶ 10. It reflects that Robert Buenzle, by virtue of his corporate positions, remains active, despite the formal change in his status, and that Terry Buenzle still relies on his advice. Turning to the entire record, the Buenzles' pre- and post-formation conduct confirms that Terry Buenzle has not exercised (and is unlikely to exercise) significant control over the applicant.[25] Thus, neither the post-formation record, by itself, nor the entire record satisfies Best's burden of showing that its ownership structure accurately depicts where control will lie.[26]

26. Even after his designation on the B cut-off date as a non-voting stockholder, Robert continued to have an active role, serving as the corporation's secretary/director.[27] As secretary/director, Robert is legally obligated, by Colorado law and the corporation's by-laws, to participate in the management of the station. These positions not only belie his formal designation as a passive owner, *Doylan Forney*, 5 FCC Rcd 5423, 5425 ¶¶ 17-18 (1990), they also place him in a position to continue dominating the applicant's affairs. *See Progressive Communications, Inc.*, 5 FCC Rcd 7058, 7058-59 ¶ 6 (1990). Thus, although the Board also cited Robert's dominant role in forming and prosecuting the application (1 FCC Rcd at 1058 ¶¶ 31-32, 40), the post-formation record does not reliably establish that Terry Buenzle will exercise exclusive managerial control, and the entire record supports the Board's determination that Best's proposal merits no integration credit. *Royce*, 5 FCC Rcd at 7064 ¶ 10.

B. TRANSMITTER SITE AMENDMENTS

27. *Background*: Having determined that ECC is the comparatively superior applicant, we turn to the site question.[28] Following the collapse of the settlement with Susquehanna, all ten applicants seek to amend their reinstated applications to specify the new transmitter site and to incorporate the other engineering changes proposed to effectuate the settlement.[29] All of the reinstated applications, except for Lord's application, presently propose operation from virtually identical transmitter sites on Doublehead Mountain. As set forth below, the Doublehead Mountain sites are no longer available, and each of the applicants currently specifying a site on Doublehead Mountain exercised due diligence in securing reasonable assurance of the availability of a site on Mount Morrison. We therefore accept the amendments filed by ECC and the other Doublehead Mountain applicants as supported by good cause. In contrast, Lord's proposed move to the Mount Morrison site is purely voluntary since there is no comparable showing that its current site is unavailable. Its amendment is therefore not supported by good cause and will be rejected.

28. To establish good cause, as required by 47 C.F.R. § 73.3522(b), for an amendment filed after the B cut-off date, its proponent "must demonstrate that it acted with due diligence; that the proposed amendment was not required by the voluntary act of the applicant; that no modification or addition of issues or parties would be necessitated; that the proposed amendment would not disrupt the orderly conduct of the hearing or necessitate additional hearing; that the other parties will not be unfairly prejudiced; and that the applicant will not gain a competitive advantage." *Erwin O'Conner*, 22 FCC 2d 140, 143 ¶ 7 (Rev. Bd. 1970). As these applicants seek to amend their engineering proposals, each must also demonstrate, pursuant to section 73.3522(b)(i), "[t]hat the amendment is necessitated by events which the applicant could not reasonably have foreseen."

29. *ECC's Amendment*: Intended not to realize a comparative advantage but to facilitate the prosecution of its reinstated application after the collapse of the settlement, ECC's Petition for Leave to Amend, filed November 26, 1990 and supplemented on December 31, 1990, is supported by good cause. On September 28, 1990, ERI -- which was to have an interest in the surviving applicant under the July 11, 1989 settlement agreement -- filed a Motion withdrawing the settlement and requesting the reinstatement of its original application. In doing so, it requested permission to retain the Mount Morrison site and other engineering materials submitted in connection with that settlement. In a subsequent pleading, filed October 12, 1990, ERI reported that it became aware of the possible loss of the original Doublehead Mountain site during the settlement negotiations, and that it confirmed the site's unavailability after the settlement fell apart.

30. Under the now-withdrawn settlement, ECC's application would have been dismissed. Thus, ECC had no obligation to concern itself with the availability of its Doublehead Mountain site during the pendency of that settlement.[30] There is therefore no merit to Lord's claim that ECC's unawareness of the site's possible loss reflects a lack of diligence. Alerted by ERI's September 28, 1990 Motion to the settlement's demise and to the possible loss of ERI's original transmitter site on Doublehead Mountain, ECC exercised due diligence in ascertaining the status of its virtually identical Doublehead Mountain site. As soon as it learned of ERI's action, ECC proceeded in a timely manner to obtain Susquehanna's permission to use the engineering amendment prepared in connection with the settlement and to secure reasonable assurance of the availability of the Mount Morrison site for its intended purpose. By its December 31, Supplement, ECC submits a November 12, 1990 letter from Hugh Rosenthal, director of station KTVD, confirming that, if ECC is the successful Evergreen applicant, mounting space on the tower and space in the building will be available for lease to ECC.

31. Apart from diligence considerations, the loss of the ECC's Doublehead site was not foreseeable, the proposed amendment was not required by the voluntary act of the applicant, and its acceptance will not require the addition of new issues or parties, unfairly prejudice the other parties, or otherwise disrupt the orderly conduct of this proceeding. As ECC notes, the Commission has already approved the engineering proposal specified in the now lapsed settlement. After reviewing the technical aspects of that proposal, the Mass Media Bureau determined that the proposed antenna site on Mount Morrison would not be short-spaced, and that it would be appropriate to waive 47 C.F.R. § 73.1030(b) to permit the use of a directional antenna proposed to protect the Table Protection Mountain Zone. *Evergreen Broadcasting Company*, 4 FCC Rcd at 8225 ¶¶ 11-13. Accepting an engineering amendment already deemed technically acceptable by the Commission and not substantively challenged by the other parties will not require any new issues or otherwise delay resolution of this proceeding.

32. To the extent that the Mount Morrison site offers better coverage than the original Doublehead Mountain site, ECC seeks no comparative advantage by virtue of this amendment, and Lord (the only applicant not currently specifying a Doublehead Mountain site) does not claim a coverage advantage based on its present site. In any event, all ten applicants seek to specify the same site on Mount Morrison. Permitting ECC to amend to the Mount Morrison site will not result in a comparative advantage vis-a-vis any applicant allowed to specify that same site. *California Broadcasting Corp.*, 90 FCC 2d 800, 810 ¶ 21 (1982). We find that all of the applicants except Lord have demonstrated good cause for their proposed site amendments.[31] As Lord seeks no coverage advantage based on its current site, permitting the other applicants to change transmitter sites would not necessitate a remand on the coverage issue even if Lord were fully qualified.

33. *Lord's Amendment*: Although a party to the settlement agreement specifying the Mount Morrison site, Lord, which was disqualified due to the short-spacing of its current site,[32] lacks good cause to amend to the Mount Morrison site. Unlike the other applicants, Lord's current application does not propose operation from the now-unavailable Doublehead Mountain site. Nor is its transmitter site alleged to be unavailable. Indeed, Lord claimed in Comments filed on December 12, 1990 that, "[a]t present, Lord is the only applicant with a transmitter site." Comments, ¶ 3. Thus, notwithstanding the threshold requirements for good cause set forth in *O'Conner*, Lord's request to change transmitter sites is totally voluntary. Despite Lord's claim, the unforeseeable loss of the other applicants' current sites does not give Lord good cause to specify the Mount Morrison site.[33] Its amendment will therefore be rejected.

C. ORDERS

34. ACCORDINGLY, IT IS ORDERED, That the Petition for Leave to Amend, filed on August 11, 1989, by Evergreen Radio, Inc. IS GRANTED to the extent reflected herein, and that the engineering portion of the attached amendment IS ACCEPTED.

35. IT IS FURTHER ORDERED, That the Petitions for Leave to Amend, filed on October 22, and December 5, 1990 by Evergreen Ventures Inc., on November 16, 1990 by Best Evergreen Broadcasting Company, on November 23, 1990 by Janet Hunter Driggs, on November 26, 1990 by Evergreen Communications Company, on November 27, 1990 by Evergreen Broadcasting Corporation II, on November 28, 1990 by Group Y Communications Investment Partnership, on December 7, 1990 by Evergreen Broadcasting Corporation, and on December 11, 1990 by Interstate Broadcasting System Of Colorado ARE GRANTED; that the attached amendments ARE ACCEPTED; and that the Request for Permission to Supplement Amendment, filed December 31, 1990, by Evergreen Communications Company IS GRANTED and the attached Supplement to Amendment IS ACCEPTED.

36. IT IS FURTHER ORDERED, That the Petition for Leave to Amend, filed on December 12, 1990, by Lord Broadcasting IS DENIED, and that the attached amendment IS REJECTED.

37. IT IS FURTHER ORDERED, That the Petition for Leave to Extend, filed on December 17, 1990, by Janet Hunter Driggs, IS GRANTED, and that the Comments, filed on December 17, 1990, by Janet Hunter Driggs ARE ACCEPTED.[34]

38. IT IS FURTHER ORDERED, That (a) the Motion to Accept Filings, filed February 10, 1987, by Evergreen Broadcasting Corporation II IS GRANTED and the Application for Review, filed February 10, 1987, by Evergreen Broadcasting Corporation II IS ACCEPTED; (b) the Petition for Leave to File Supplemental Comments, filed March 13, 1987 by Best-Evergreen Broadcasting Company IS GRANTED and the Supplemental Comments on Applications for Review, filed March 13, 1987, by Best-Evergreen IS ACCEPTED; (c) the Motion to Strike, filed March 24, 1987, by the Mass Media Bureau IS GRANTED and the Consolidated Reply, filed March 18, 1987, by Lord IS REJECTED;[35] (d) the Motion to Strike, filed March 27, 1987, by Lord Broadcasting IS DENIED;[36] (e) the Motion for Extension of Time, filed August 3, 1988, by Group Y IS GRANTED and the Reply, filed August 17, 1988 IS ACCEPTED;[37] (f) the Motion to Accept Supplement, filed April 10, 1987 and the Motion to Accept Second Supplement, filed July 15, 1988, by Group Y Communications ARE GRANTED, and the Supplement, filed April 10, 1987, and the Second Supplement, filed July 15, 1988, ARE ACCEPTED; (g) the Motion to Strike ERI's Opposition to Notification of Elimination of Short-Spacing, filed July 25, 1988, by Lord Broadcasting IS DENIED;[38] and (h) the Motion to Strike ERI's Supplement, filed May 17, 1989, by Evergreen Broadcasting Company IS DENIED and the Supplement to Application for Limited Review, filed May 12, 1989 by Evergreen Radio, Inc. IS ACCEPTED.

39. IT IS FURTHER ORDERED, That pursuant to 47 C.F.R. § 1.115(g), the Application for Review, filed on February 9, 1987 by Evergreen Communications Company IS GRANTED to the extent reflected herein; that the Applications for Review, filed on January 27, 1987 by Lord Broadcasting, on February 9, 1987 by Evergreen Broadcasting Company, Group Y Communications Investment Partnership, Janet Hunter Driggs, Interstate Broadcasting System of Colorado, EverGreen Radio, Inc., Best-Evergreen Broadcasting Company, and Evergreen Ventures, Inc., and on February 10, 1987 by Evergreen Broadcasting Corporation II ARE DENIED; and that the Review Board Decision in *Payne Communications, Inc.*, 1 FCC Rcd 1052 (Rev. Bd. 1986) IS MODIFIED as reflected herein.

40. IT IS FURTHER ORDERED, That the application of Evergreen Communications Company (File No. BPH-821217BC) IS GRANTED; that (1) the Joint Request For Approval of Settlement Agreement, filed March 21, 1991, by Evergreen Communications Company, Evergreen Radio, Inc., and Group Y Communications Investment Partnership, (2) the Joint Request for Approval of Settlement Agreement, filed July 12, 1991, by Evergreen Radio, Inc., Evergreen Communications Company, Group Y Communications Investment Partnership, Evergreen Ventures, Inc., and Lord Broadcasting, (3) the Joint Request for Approval of Settlement Agreement, filed July 31, 1991, by Evergreen Radio, Inc., Evergreen Communications Company, and Janet Hunter Driggs, (4) the Joint Request for Approval of Settlement Agreements, filed July 31, 1991, by Evergreen Broadcasting Corporation II, Evergreen Radio, Inc., and Janet Hunter Driggs, and (5) the Request

for Approval of Settlement Agreement, filed July 31, 1991, by Evergreen Ventures, Inc. and Janet Hunter Driggs ARE GRANTED; that the attached settlement agreements ARE APPROVED; that the following applications ARE DISMISSED: (1) Group Y Communications Investment Partnership (File No. BPH-821217AZ), (2) Evergreen Radio Inc. (File No. BPH-821217BG), (3) Evergreen Ventures, Inc. (File No. BPH-821217AI), (4) Lord Broadcasting (File No. BPH- 821217AE), and (5) Janet Hunter Driggs (File No. BPH-821217BE); and that the following applications ARE DENIED: (1) Evergreen Broadcasting Company (File No. BPH-821216AC), (2) Best-Evergreen Company (File No. BPH-821217AC), (3) Interstate Broadcasting System of Colorado, Inc. (File No. BPH-821217AO), and (4) Evergreen Broadcasting Corporation II (File No. BPH-821217AV).

41. IT IS FURTHER ORDERED, That the grant of a construction permit to Evergreen Communications Company IS SUBJECT to both the special operating conditions or restrictions usually specified for a station located near Table Mountain and the standard conditions specified for a new directional antenna.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *Evergreen Broadcasting Company*, 4 FCC Rcd 8224 (OGC 1989), vacated, 6 FCC Rcd 1606 (OGC November 27, 1990).

[2] In addition to the pleadings reinstated by paragraph 8 of the General Counsel's November 26, 1990 Order, the following pleadings are pending before the Commission: (*a*) Comments, filed on December 12, 1990 by EBC, ECC, Evergreen II, ERI, Lord, Best, EVI, and Group Y, and on December 17, 1990 by Driggs; (*b*) Opposition (or Reply) Comments, filed on December 19 by Lord, on December 21 by Driggs, on December 28 by EBC, on December 31 by ECC, and on January 3, 1991 by ERI and by Group Y; (*c*) Comments on Petition for Leave to Amend and Comments of Lord, filed December 21, 1990, by the Mass Media Bureau; (*d*) pleadings relating to the site issue, discussed at paragraph 27 below; and (e) pleadings relating to a series of settlements, discussed at note 4 below.

[3] By virtue of a B cut-off date amendment, Lord specified a site that was short-spaced with Station KSBT in Steamboat Springs, Colorado. The Board properly disqualified Lord on the short-spacing issue (1 FCC Rcd 1052-54 ¶¶ 4-10). Lord argues that the short-spacing of its current site is cured by the Commission's subsequent substitution of Channel 245C2 for Channel 244A at Steamboat Springs. Having failed to address the short-spacing of its present site in a timely manner, however, Lord may not rely on a purely fortuitous change in the Steamboat Springs station to cure the short-spacing. *See Cuban-American Limited*, 5 FCC Rcd 3781, 3783 ¶ 18, recon. denied sub nom. *Miami Latino Broadcasting Corp.*, 5 FCC Rcd 7321 (1990), citing *Chudy Broadcasting Corp.*, 58 RR 2d 133, 134 n.7 (1985)("temporizing with flawed proposals disserves the public interest by delaying the initiation of new service"). In any event, the ALJ is correct that, even if fully qualified, Lord is not the comparative winner since its 50% full-time and 50% part-time integration proposal is quantitatively and qualitatively inferior to ECC's 100% full-time proposal (*Initial Decision* ¶¶ 161, 171). (The Board did not consider Lord's comparative qualifications.)

[4] In a series of settlements filed on March 21, July 12, and July 31, 1991, ERI, ECC, Group Y, Driggs, EVI, EBC II, and Lord have agreed in essence that, if the Commission selects one of these applicants, the unsuccessful applicants agree not to challenge the selection of any applicant with which it has entered into a settlement agreement. They agree further that, when the Commission's selection is subject to no further agency or judicial appeals by those applicants that did not reach a settlement with the selected applicant, they will dismiss their applications. In exchange, the prevailing applicant will make various monetary payments to the dismissing applicants. (ECC has agreed that, if it is the prevailing applicant, it will pay $500,000 to ERI and to Group Y; $300,000 to Driggs; and $150,000 to Lord and to EVI; there is no agreement between ECC and EBC II). In pleadings filed on April 3, 1991, July 25, 1991, and August 14, 1991, EBC, which is not a party to any of the settlements, opposes them. The Bureau supports the first two groups of settlements, but has not filed comments pertaining to the third settlement. In view of our action herein granting ECC's application, we approve the settlement agreements and dismiss the applications filed by ERI, Group Y, EVI, Lord, and Driggs, each of which has entered into a settlement agreement with ECC. Despite EBC's claims, the agreements comply fully with 47 U.S.C. § 311(c) of the Act and 47 C.F.R. § 73.3525 of the Rules, they raise no question as to the Settling Parties' financial qualifications, and their approval serves the public interest.

[5] On several occasions the applicants sought to supplement their original applications for review in order to bring to our attention recent cases affecting the comparative issue. In view of the protracted nature of this proceeding, and as a matter of fairness, we accept all such filings. Thus, we accept Best's March 13, 1987 Supplemental Comments, Group Y's two Supplements, filed on April 10, 1987 and on July 15, 1988, and ERI's May 17, 1989 Supplement.

[6] With only 50% quantitative integration credit, ERI ranks far behind ECC. Thus, we need not resolve allegations that the integration proposal of ERI's 50% owner Levi Beall also merits no credit because ERI did not not meet its burden of showing that his integration proposal is capable of effectuation in light of Mr. Beall's current business activities, or that ERI lacked candor concerning the termination of Mr. and Mrs. Beall's employment at a Denver radio station.

[7] Citing *Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5065 ¶ 14 (1989), Evergreen II urges that the proposed integration of its 47% owner, Barbara Goodman, as "business manager" should have been credited. In *Miracle Strip*, we credited the proposed integration of an owner whose primary responsibility -- managing and supervising employees involved bookkeeping, sales, and traffic activities -- was "roughly analogous" to that of a business manager, a position deserving "particular weight" under the 1965 *Policy Statement*, 1 FCC 2d 393, 395 (1965). However, we indicated that it was a "close question" whether the owner's proposal merited integration since she would also spend some time engaged in direct sales. Here, the ALJ correctly held that, while designated as the "business manager," Ms. Goodman's position will not involve a significant role in management or policymaking at the station (*Initial Decision* ¶ 151).

[8] We affirm the ALJ's determination (*Initial Decision*, ¶¶ 156-57) that Keith Siebert's position as financial officer/business manager is managerial and qualifies for integration credit.

[9] *See Coast TV*, 4 FCC Rcd 1786, 1788 ¶ 15 (1989), citing *Victory Media, Inc.*, 3 FCC Rcd 2073, 2074 ¶ 17 (1988). The Commission later amended FCC Form 301 to require that, effective June 26, 1989, the applicant must submit its written integration proposal when the application is filed. *See* generally, *Revision of Application For Construction Permit for Commercial Broadcast Station*, 4 FCC Rcd 3853, 3855-3858 ¶¶ 19-38 (1989).

[10] With only 40% quantitative integration, Group Y falls far behind 100% integrated ECC. Thus, we need not address the other applicants' arguments that the proposed integration of 20% general partner, Anna Yacovazzi, merits no comparative credit because her position is not clearly managerial and because she will defer to her husband.

[11] To the extent that Group Y relies on the Board's opinions in *Chester Associates*, 1 FCC Rcd 1152 (Rev. Bd. 1986) and *Independent Masters*, 104 FCC 2d 178 (Rev. Bd. 1986), both cases predate the Commission's *Cotton* determination that insulation standards apply retroactively to all pending cases. In any event, the partnership agreements at issue in both cases were deemed by the Board to comply with the basic *Anax* standards for insulation.

[12] While the attribution standards were adopted before the *Doylan Forney* applicant filed its application and executed the partnership agreement, those standards had not been applied to integration issues in comparative cases at that time.

[13] In any event, EVI would not be entitled to any comparative credit for the proposed position of Cynthia Marschner. As the ALJ found, she will have a non-managerial position, not warranting integration credit (*Initial Decision*, ¶ 147).

[14] As we indicated in *KIST Corp.*, 102 FCC 2d 288, 291 n.8 (1985), in the absence of facts undermining the *bona fides* of the stated ownership structure, "we are unpersuaded that there is any relevance to the manner in which [the principals] came to enter into the agreement."

[15] Williams, the proposed program director, replaced Samson, who originally intended to hold that position (Tr. 299-300). Williams was not involved in forming EVI, its business planning or its program planning, and he made no changes in the program plans after joining EVI (Tr. 304-05, 321-22). Ms. Martinez, the proposed Public Relations Director in charge of EEO was not involved in putting together EVI's EEO proposal, and she made no changes in that proposal after joining EVI (Tr. 350).

[16] *Cannon's Point Broadcasting*, 93 FCC 2d 643 (Rev. Bd. 1983) (subsequent history omitted), is clearly distinguishable from this case. There, we fully credited the integration proposal of an inexperienced sole proprietor who proposed to employ as general manager her husband, an experienced broadcaster. In so doing, we rejected the narrow claim that the husband was the real party in interest behind the application because the allegation that the husband was a real-party-in-interest was not documented as required by section 1.229 of the rules. Instead, the party seeking the issue relied solely on the marital relationship and the wife's relative inexperience. Here, however, we rely on the husbands' pre- and post-formation activities, as well as the parties' marital relationships, in disregarding EVI's integration proposal. *See* note 17 and accompanying text, *infra*.

[17] Before the application was filed, Mr. Mann (a non-owner) and his wife (a nominal owner) discussed all aspects of the application including the programming and the make-up of the corporation (Tr. 296, 298). Once Ms. Martinez joined EVI as an owner, she talked to Mr. Mann about the EVI application on several occasions (Tr. 343, 346, 355). Cynthia Marschner testified that her husband counseled the nominal owners but made no actual decisions (Tr. 331). When Williams joined EVI he was originally approached by Jean Mann and Charles Samson, but he also talked to Mr. Mann about the application (Tr. 363).

[18] *See Progressive Communications, Inc.*, 5 FCC Rcd at 7058-59 ¶ 6, disregarding an integration proposal where someone other than the specified owners would have an undisclosed, continuing interest in the applicant.

[19] EBC argues (1) that the partnership agreement unequivocally places control of the station with the general partners, as is required to avoid attribution of the limited partner's interest; and (2) that the ALJ improperly rejected its post B-cutoff amendment further restricting the limited partner's right to vote on the removal of a general partner. We affirm the Board's conclusion that the agreement is deficient, and the ALJ's rejection of EBC's post B-cutoff amendment, Memorandum Opinion and Order, FCC 85M-4061 (Oct. 17, 1985). EBC argues that the agreement complies with *Ownership Attribution (Clarification)*, 1 FCC Rcd 802, 803 ¶ 6 (1986), in allowing Tunis to participate in the removal of a general partner only with cause and after the vote of at least 50% of the general partners (excluding the general partner being removed). EBC also disputes the Board's finding (1 FCC Rcd 1060 ¶ 39) that Tunis has a vote equal to or greater than the general partners in the admission of new general partners, the substitution of general partners, and the assignment of a general partner's interest. However, since Tunis' concurrence is needed to remove a general partner, he has a veto over such matters that is inconsistent with his purported passivity. In this respect, the original agreement is deficient under *Anax*, and we would reject the post B cut-off amendment (and award EBC no more than 51% integration credit), even if there were no other problems as to the *bona fides* of its proposal. However, such credit for the proposed integration of the three general partners would still leave EBC far behind ECC's 100% integration.

[20] Compare *Metroplex Communications, Inc.*, 5 FCC Rcd 5610, 5612 ¶ 14 (1990), holding it incredible that experienced investors would entrust exclusive managerial control to strangers with no broadcast experience, who would make no investment in the station, with *Miami Latino Broadcasting Corp.*, 5 FCC Rcd 7321, 7322 ¶ 11 (1990), crediting the integration proposal of an experienced broadcaster with a significant financial stake in the applicant and the legal obligations to pay her share of the prosecution expenses and to personally co-guarantee a $5 million bank loan.

[21] *See Poughkeepsie, at* ¶ 6, discrediting the integration proposal of an experienced broadcaster with no financial obligation to the applicant where the general and limited partners had talked briefly on the phone but had never met and the 10% general partner did not try to negotiate a higher equity interest in exchange for undertaking a general partner's unlimited liability.

[22] Before going into partnership with Tunis, the three general partners discussed Tunis' proposal among themselves and with their attorney. Nevertheless, they ultimately accepted, without negotiation, the deal that Tunis offered. In this respect, this case is distinguishable from *Susan M. Mulkey*, 4 FCC Rcd 5520, 5521 ¶ 6 (1989), where the voting stockholder's 10% interest was clearly a product of negotiations with the non-voting stockholder. Not only did she testify that her 10% equity interest represented a level of financial commitment that she felt comfortable with, but part of her stock was in return for services actually rendered and she signed a promissory note for the balance that would be payable in 5 years even if the applicant lost. 4 FCC Rcd at 5521 ¶ 6. Under these circumstances, we deemed a two-tiered ownership structure to be credible despite the passive owner's initial role in forming the applicant.

recruiting the voting stockholder, locating the antenna site, initially contacting the site owner, financing the application, and loaning the voting stockholder part of the money to buy her 10% equity share.

[23] Compare the activities of the 10% voting stockholder in *Mulkey*, 4 FCC Rcd at 5521 ¶ 7. Despite the fact that she had never been employed at a broadcast station, she took an active role in prosecuting the application. She retained counsel, was instrumental in deciding to adopt a corporate form, consulted with communications counsel, chose and arranged to lease the antenna site, helped draft the application, set up a bank account for the applicant, and was the only person authorized to sign checks. And, unlike Tunis, the purportedly passive owner in *Mulkey* did not retain any authority under the corporate charter or engage in any post-formation activities that would belie his designation as a non-voting stockholder. *Id.* at 5521 ¶ 8.

[24] For example, contrary to the provision of the partnership agreement barring Tunis from rendering services that materially relate to the partnership's media activities, Tunis' escrow agent, rather than the general partners, is authorized to pay all partnership bills. Only after the grant of a construction permit will the general partners have access to partnership funds and begin paying the bills. In addition, Tunis has advanced funds to EBC in a manner that is contrary to the provisions of the partnership agreement (*Initial Decision* at ¶¶ 127-129).

[25] The record reflects that, before the B cut-off date amendment, Robert made virtually all the decisions for the partnership. He selected the engineer and counsel, arranged for a transmitter site and developed the financial proposal (Tr. 919). Despite her initial status as controlling (51%) general partner, Terry's assistance in preparing the application consisted in typing in the answers (Tr. 919-920), and in sharing the cost of prosecuting the application (Tr. 946).

[26] This case is distinguishable from *Marlin Broadcasting Corp.*, 5 FCC Rcd at 5752-53 ¶ 15 & n.15. There, a general partnership (with the wife holding 51% and the husband holding 49% equity) was amended on the B cut-off date to effect a 95%/5% equity split. The Commission rejected as not supported by the evidence the amendment, but did not reduce the applicant's 100% quantitative credit because there was no dispute that the spouses would together exercise exclusive managerial control over the applicant, with neither spouse dominating the other spouse. Here, the evidence shows in contrast that, despite Terry Buenzle's initial designation as the controlling owner, her husband Robert made virtually all of the decisions for the partnership before the change in his status, and after that date Terry has continued to defer to her husband.

[27] In discrediting Best's integration proposal we do not rely on the fact that Robert Buenzle also belonged to the law firm that continued to represent (and currently represents) the applicant even after the B cut-off date reorganization depicting him as a non-voting stockholder. *See Marin TV v. FCC*, 936 F.2d 1304 (D.C. Cir. 1991), remanding for further clarification our policy of requiring attribution of interests held by principals who provide legal services. His positions as corporate secretary/director, standing alone, violate the "no material involvement" standard necessary to avoid attribution for comparative purposes of an equity interest held by a purportedly passive owner. *Doylan Forney*, 5 FCC Rcd at 5425 ¶¶ 17-18. Thus, even if the record reflected that Terry Buenzle had exercised, and will continue to exercise, significant managerial control over the applicant, Robert's interest would be attributable. This would give Best only 51% or 60%, depending on whether the record also supported the B cut-off date reorganization. *See Marlin*, 5 FCC Rcd at 5752-53 ¶ 15 & n.15. Even with the maximum 60% credit for Terry's proposed integration as general manager, however, Best would rank far behind ECC's 100% integration credit.

[28] In addition to the filings listed in note 2 above, the following pleadings are also pending before the Commission: *(a)* Petitions for Leave to Amend, filed on August 11, 1989, by Evergreen Radio, Inc., on October 22, and December 5, 1990, by EVI, on November 16, 1990 by Best, on November 23, 1990 by Driggs, on November 26, 1990 by ECC, on November 27, 1990 by Evergreen II, on November 28, 1990 by Group Y, on December 7, 1990 by EBC, on December 11, 1990 by Interstate Broadcasting System, and on December 12, 1990 by Lord; *(b)* Request for Permission to Supplement Amendment, filed December 31, 1990, by ECC; *(c)* Oppositions to Lord's Petition for Leave to Amend, filed on December 20, 1990 by ERI and by EVI, and on December 21, 1990 by Group Y; and *(d)* Comments on Lord's Petition for Leave to Amend, filed December 21, 1990, by the Mass Media Bureau.

[29] Pursuant to the settlement, the engineering materials were prepared by non-party Susquehanna and filed by ERI in its August 11, 1989 Petition for Leave to Amend. (The settlement proposed the grant of ERI's amended application.)

[30] ERI also had no obligation to report any changes in its pre-settlement proposal during the pendency of a universal settlement proposing to amend ERI's proposal, to dismiss all competing applications, and to grant ERI's amended application relying on the Mount Morrison site. Final approval and consummation of that agreement would have mooted all hearing issues (including Lord's short-spacing issue). For this reason, the possible loss of the original Doublehead site became decisionally significant, and reportable under 47 C.F.R. § 1.65, only after the settlement collapsed. Thus, there is no merit to Lord's claim (Opposition Comments at 3-4) that a remand is necessary to determine whether there was a lack of candor in not reporting the loss of the Doublehead Mountain site until after the agreement was withdrawn.

[31] Alerted by ERI's request to incorporate the engineering proposal prepared by Susquehanna to effectuate the settlement agreement, each of the other applicants presently specifying virtual identical transmitter sites on Doublehead Mountain exercised such diligence. Each certifies that it proceeded in a timely manner to confirm the actual loss of its site, to secure permission to use the engineering prepared by Susquehanna, and to obtain reasonable assurance of the Mount Morrison site's availability for its respective use. *See Newton Television Limited*, 5 FCC Rcd 2755 ¶ 4 (1990). We therefore accept all eight amendments from the applicants other than Lord.

[32] *See* note 3, supra.

[33] Both the Doublehead Mountain and the Mount Morrison sites are properly spaced. *Evergreen Broadcasting Company*, 4 FCC Rcd at 8225 ¶ 12. Thus, despite Lord's claim, the loss of the Doublehead Mountain site does not establish the threshold requirement for a waiver of the Commission's minimum mileage separation rules -- that there are no suitable transmitter sites that are properly spaced under those rules.

[34] Driggs' December 17, 1990 extension request is supported by a showing of good cause, as required by 47 C.F.R. § 1.46(a). *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 172 n.34 (1991). The General Counsel's November 26, 1990 Order afforded the Mass Media Bureau and the applicants an opportunity to address the impact of the *Royce* decision on the comparative issue. Driggs alleges that, despite diligent efforts, she could not obtain a copy of *Royce* until December 11, 1990.

[35] We grant the Bureau's March 24, 1987 Motion to Strike and reject Lord's March 18, 1987 Reply. As the Bureau urges, section 1.115(f) authorizes the filing of replies only if requested by the Commission. We have not requested replies in this proceeding and do not believe that they will aid our resolution of this case.

[36] Lord argues that, pursuant to 47 C.F.R. § 1.115(d), the March 10, 1987 oppositions are untimely as to its January 27, 1987 application for review. It is the Commission's practice to consolidate response dates based upon the last date permitted for the filing of a pleading. To do otherwise would wreak havoc, especially in a multi-party proceeding. By Order, FCC 87I-20 (released Feb. 25, 1987), the General Counsel extended the time for filing responses to all of the applications for review to March 10, 1987, and Lord indicated that it would not object to that extension of time. Thus, the March 10, 1987 oppositions were timely even as to Lord's earlier filed application for review.

[37] Group Y's unopposed extension request is supported by good cause since Group Y did not receive EVI's July 19, 1988 Opposition to Motion to Accept Second Supplement until July 28, 1988.

[38] As it was not improper for Lord to notify us of the channel substitution for Station KSBT in Steamboat Springs or for ERI to Oppose that Notification on procedural grounds, we do not dismiss the July 8, 1988 Notification or grant Lord's July 25, 1988 Motion to Strike ERI's Opposition to Notification.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Capital Network Systems, Inc. — Transmittal No. 1

Tariff F.C.C. No. 2

MEMORANDUM OPINION AND ORDER

Adopted: September 10, 1991 Released: September 10, 1991

By the Chief, Common Carrier Bureau:

I. BACKGROUND

1. On June 13, 1991, Capital Network Systems, Inc. (CNSI) filed Transmittal No. 1 to its Tariff F.C.C. No. 2 to introduce Interstate Common Carrier Transfer Service (IXC Transfer Service). The tariff states that CNSI provides IXC Transfer Services when an end user reaches CNSI facilities or services to make an interstate telephone call by dialing a service prefix indicator (*e.g.* "0+", "0-") and the end user attempts to charge the call to a non-joint use calling card.[1] Proposed Section 3.1. The tariff further states that in such cases CNSI will transfer the call at the originating location to the Interexchange Carrier (IXC) which can validate and bill the end user's telephone call. *Id.* In informal discussions with Bureau staff, CNSI clarified that CNSI would transfer the call at the originating location to the local exchange carrier (LEC) who would then be responsible for transferring the call to the IXC.[2]

2. CNSI's tariff specifies that the IXC to whom the call is being transferred is the "customer" of IXC Transfer Service. *Id.* at Proposed Sections 1.0, 3.1, 4.1. Proposed Section 3.1 states that a call is deemed transferred for billing purposes when CNSI activates the switch to transfer the call. Proposed Section 3.2 assesses a service charge to the IXC to whom the end user call is being transferred of $1.50. The tariff states that the charge is designed to recover the costs incurred by the use of CNSI switching capacity, associated access and transport facilities, and operator services required to transfer an end user call to the IXC whose non-joint use calling card cannot be validated by CNSI. *Id.* IXCs will be billed on a per call transfer basis. *Id.* at Proposed Section 4.1. Transmittal 1 is scheduled to become effective September 11, 1991.

II. DISCUSSION

3. Transmittal 1 is unclear and ambiguous. It is therefore in violation of Part 61 of the Commission's Rules, 47 C.F.R. Part 61.[3] Section 61.2 of the Commission's Rules, 47 C.F.R. § 61.2, requires that tariff publications contain clear and explicit explanatory statements regarding the rates and regulations. In addition, Section 61.54(j) of the Rules, 47 C.F.R. § 61.54(j), requires that general rules (including definitions), regulations, exceptions and conditions which govern the tariff must be stated clearly and definitely. The tariff language in Transmittal 1 violates both these rule sections. There is no indication in the tariff as to how an interstate carrier becomes a customer of the IXC Transfer Service; apparently CNSI would unilaterally treat IXCs as customers once the tariff becomes effective, regardless of whether the IXC orders, or is even aware of the service. Since the mechanism by which the party to be charged becomes a customer is unclear, we must reject Transmittal 1.

4. Moreover, Transmittal 1 appears to conflict with Section 201 of the Communications Act, 47 U.S.C. § 201(b). Section 201(b) requires, *inter alia*, that all practices in connection with interstate communications by wire be just and reasonable, and declares unlawful any practice found to be unreasonable. The service described in Transmittal 1 does not appear to be a service being rendered to the party that would be charged. If this is in fact the situation created by CNSI's tariff, CNSI's attempt to charge a party for service which that party neither orders nor receives would constitute an unreasonable practice. *See id.* at Proposed Section 3.1. Despite CNSI's attempt to label the IXC to whom the call is transferred as the "customer" of the IXC Transfer Service, it does not appear that the IXC is the party who orders service under the tariff. Nor does the IXC appear to be the party who receives any service from CNSI. As described by the tariff, the act precipitating the need for the service described is that of the end user accessing CNSI facilities and "insist[ing] on using a nonjoint use calling card," which CNSI cannot validate. Proposed Section 3.1. As described by CNSI, however, the call will actually be switched back to the originating LEC, not to the card-issuing IXC. The LEC may or may not switch the call to the appropriate IXC, although CNSI's tariff would charge the IXC at the time CNSI activates the switch to transfer the call.

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[1] CNSI defines non-joint use calling card as any calling card issued by an IXC which does not allow CNSI to validate for billing purposes, or which CNSI is unable to validate for other reasons. Non-joint use calling cards may include Carrier Issuer Identification Cards (CIID) cards.

[2] Despite CNSI's representation, it is not clear from CNSI's tariff whether the IXC to whom the call ultimately is being transferred would be able or willing to determine the originating location of the call. Thus, CNSI's tariff gives rise to the distinct possibility of "call splashing." Call splashing is defined in Section 226(a)(3) of the Communications Act, 47 U.S.C. § 226(a)(3), as the transfer of a call from one operator service provider to another in such manner that the subsequent provider is unable or unwilling to determine the location of the origination of the call and, because of such inability or unwillingness, is prevented from billing the call on the basis of such location. Section 226(b)(1)(I) prohibits billing for a call that does not reflect the location of the origination of the call except as provided in Section 226(b)(1)(H). Section 226(b)(1)(H) prohibits call splashing unless the consumer requests to be transferred to another provider of operator services, is informed prior to incurring any charges that the rates for the call may not reflect the rates from the actual originating location of the call, and the consumer then consents to be transferred.

[3] Section 61.1 of the Commission's Rules, 47 C.F.R. § 61.1 states that failure to comply with any provisions of Part 61 may be grounds for rejection of the non-complying publications.

5. Furthermore, the tariff does not contain any provisions regarding, or even a description of, the means by which a call is switched from the originating LEC to the IXC. Indeed, the tariff does not provide for any contact whatsoever between CNSI and the IXC. In this scenario, the IXC cannot reasonably be deemed to be a customer who "requested" service from CNSI. Therefore, despite CNSI's repeated attempts, mere labelling of the IXC as the "customer" cannot convert the IXC into the party to whom payment responsibility is properly assigned under the tariff.

6. For these reasons, CNSI's Transmittal 1 is patently unlawful and is rejected. *See American Broadcasting Companies v. F.C.C.*, 663 F. 2d 133, 138 (D.C. Cir. 1989); *Associated Press v. F.C.C.* 448 F. 2d 1095, 1103 (D.C. Cir. 1971); *AT&T Communications*, 5 FCC Rcd. 700 (CCB 1990).

III. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that Capital Network Systems, Inc., Tariff F.C.C. No. 2, Transmittal No. 1 IS REJECTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 19, 1991

INFORMATION MEETING FOR USERS
OF
TARIFF DIVISION PUBLIC REFERENCE ROOM

The Tariff Division has scheduled a meeting for users of the Tariff Division Public Reference Room. This meeting will be held in the reference room on Friday, September 27, 1991 from 10 a.m. to 11 a.m. Personnel from the Tariff Review Branch will be available during this time to provide information on the various documents available in the reference room; explain procedures for signing out material; and answer any questions users may have. All members of the public are invited. Questions concerning this meeting should be directed to Tom Elcan or Judy Nitsche in Room 518, (202 632-5550).

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 3206

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: September 16, 1991 Released: September 16, 1991

By the Deputy Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 3206 to modify Virtual Telecommunications Network Service (VTNS) Option 15, under which AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. Specifically, the modifications to Option 15: reduce the measured charges; reduce the minimum annual charge; introduce an installation charge waiver; and increase discount levels in the domestic data transmission capability (DTC) volume pricing plan. *See* AT&T Transmittal No. 3206 Description and Justification at 2. The transmittal is scheduled to take effect on September 17, 1991.

2. Williams Telecommunications Group, Inc. (Williams), filed a petition to reject or suspend and investigate the Option 15 modifications in Transmittal No. 3206 on July 5, 1991.[1] AT&T filed a reply to the Williams petition on July 15, 1991.

3. Williams contends that modified Option 15 raises the same issues as the options remanded by the U.S. Court of Appeals in the *Tariff 12 Remand*[2] and must be reviewed in light of the remand. Williams Petition at 2-3. Williams argues that AT&T has failed to demonstrate that modified Option 15 is an integrated service package that is "unlike" its component services and thus has failed to justify the discrimination between this option and AT&T's other services. *Id.* at 3-8 (also claiming that Option 15 will be dominated by a single service since over 49 percent of the monthly package revenues and roughly 67 percent of the total projected monthly minutes of use under this transmittal can be attributed to 800 Service).

4. Williams argues that even if Option 15 could qualify as an integrated service package, its rates vary without justification from other options under Tariff 12 and are thus discriminatory. *Id.* at 8-10 (also arguing that because the service packages are like, the Commission should examine the underlying contracts). Williams next claims that the modifications to Option 15 impermissibly bundle 800 Service with other Tariff 12 services thereby allowing AT&T to take advantage of the lack of 800 number portability to capture almost all of a customer's other interexchange services. *Id.* at 10-13 (also citing comments of some Tariff 12 customers as support for this claim). Williams further alleges that modified Option 15 violates the Commission's policy against geographic rate deaveraging, that it is not generally available, and that it is not in compliance with the Private Line Guidelines. *Id.* at 1316.

5. AT&T replies that Williams raises only one new claim in opposition to the revisions to Option 15. AT&T Reply at 1. In response to Williams' claim that the offering is not integrated, AT&T insists that VTNS options are integrated not simply because they contain particular percentages of individual service elements or transmission capabilities. Rather, says AT&T, these options are integrated in that they are customized networks which are provisioned differently from individually tariffed services and in which AT&T provides, and customers obtain, multiple complementary communications capabilities and functionalities unavailable under individual service tariffs. *Id.* at 2-3.

6. In response to Williams' claims of discrimination, anticompetitive bundling," likeness" among options, lack of general availability, and geographic rate deaveraging, AT&T maintains that these claims have been raised without success in previous VTNS filings and are patently without merit. *Id.* at 3-4. AT&T also insists that the Court of Appeals decision creates no basis to reject or suspend new or revised VTNS offerings and notes that the Commission has issued several Orders allowing VTNS Options to become effective since the release of the Court of Appeals *Tariff 12 Remand*. *Id.* at 4-5. Therefore, AT&T asserts that the most that the Commission should do is make Option 15 subject to the outcome of the remand proceeding. *Id.* at 5.

7. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3206, the petition filed by Williams, and AT&T's reply. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection.

8. On October 23, 1990, the U. S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See Tariff 12 Remand*. Although Transmittal 3206 does not present new questions that warrant investigation at this time, it could be affected by the Commission's decision in the CC Dock-

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[1] We do not address in this Order a petition submitted against Transmittal 3206 by MCI Telecommunications Corporation (MCI) on August 26, 1991, 52 days after the filing deadline, or AT&T's reply to that petition filed September 3, 1991. MCI incorrectly cites Section 1.45 of the Commission's Rules, 47 C.F.R. § 1.45, as its authority for the late filing. Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773, controls the pleading cycle for petitions against tariff filings. Pursuant to subsection (a)(2)(ii) of that section, petitions against this transmittal were due no later than July 5, 1991.

[2] *See MCI Telecommunications Corp. v. FCC*, 917 F. 2d 30 (D.C. Cir. 1990) (*Tariff 12 Remand*), *rev'g and remanding* AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932 (*Tariff 12 Order*), *recon. denied*, 4 FCC Rcd 7928 (1989).

et 87-568 remand proceedings. Therefore, Transmittal 3206 takes effect subject to the outcome of the remand proceedings in CC Docket 87-568.

9. Accordingly, IT IS ORDERED that the petition to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3206, filed by Williams Telecommunications Group, Inc., IS DENIED.

10. IT IS FURTHER ORDERED that the petition to reject American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3206, filed by MCI Telecommunications Corporation, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 20, 1991

COMMENTS INVITED ON FLORIDA PUBLIC SAFETY PLAN AMENDMENT

On May 10, 1990, the Commission accepted the Public Safety Plan for Florida (Region 9). On September 13, 1991, Region 9 submitted a proposed amendment to its plan that would revise the current channel allotments to correspond to its current database and update tables contained in the plan. The amendment also eliminates some sections and tables because they are unnecessary with the new Florida Region Interference Program. Because the proposed amendment is a major change to the Region 9 plan, the Commission is soliciting comments from the public before taking action. (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 57.)

Interested parties may file comments to the proposed amendment on or before **October 31, 1991** and reply comments on or before **November 15, 1991.** Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **Gen. Docket 90-119 Florida-Public Safety Region 9.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS

Tariff F.C.C. No. 15 Transmittal Nos. 3143, 3163, 3271, 3279

Competitive Pricing Plan Nos.
19, 20, 21, 22

MEMORANDUM OPINION AND ORDER

Adopted: September 25, 1991 Released: September 25, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. AT&T Communications (AT&T) filed the above-captioned transmittals proposing discounts to four customers, pursuant to its Tariff 15 which provides discounted rates to individually-named customers.[1] According to AT&T, these discounts respond to offers made by US Sprint Communications Company Limited Partnership (US Sprint) and MCI Telecommunications Inc. (MCI). Petitions against these transmittals were filed by MCI, US Sprint and the Competitive Telecommunications Association (CompTel).[2] Each transmittal establishes a Competitive Pricing Plan (CPP) which offers monthly discounts ranging from ten to twenty-four percent on AT&T services such as Software Defined Network, Megacom, College Connect Calling Service and several 800 services. For the reasons discussed below, we reject these transmittals as unlawfully discriminatory, pursuant to Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), (the Act).

II. BACKGROUND AND PLEADINGS

2. AT&T says it filed the Tariff 15 plans at issue here (CPP19, CPP20, CPP21 and CPP22) because its competitors offered discounts to these specific customers at rates significantly below the competitors' tariffed rates. In its transmittals, AT&T claims that it is entitled to respond with rates which match or exceed the rates offered to each specific customer by these competitors because of competitive necessity. *See e.g.*, AT&T Transmittal 3143, Description & Justification (D&J) at 8.

3. These plans not only discount standard tariff rates but also limit the availability of the discount, in accordance with Section 2.1.5.3 of Tariff 15. That section specifies that these plans "are designed to respond to special discounts offered to specific Customers by competing interexchange carriers." This section notes that in order for another customer to receive one of these discounts, a customer would have to "demonstrat[e] that they have received substantially similar offers from the competing interexchange carrier." *See* Tariff 15, Section 2.1.5.3.

4. AT&T argues that any discrimination which results from this limitation on availability is reasonable because it is justified by competitive necessity.[3] According to AT&T, the actions of its competitors force AT&T to deviate from its generally available tariff rates in order to obtain a customer's business.

5. Petitioners argue, *inter alia*, that AT&T's reliance on the competitive necessity defense as justification for its single customer discounts is misplaced. *See e.g.*, US Sprint CPP19 Petition at 2-3, 6-7; MCI CPP20 Petition at 4; CompTel CPP20 Petition at 2. Petitioners contend that AT&T's limit on the availability of these discounts constitutes unreasonable discrimination. *See e.g.*, US Sprint CPP19 Petition at 3, MCI CPP20 Petition at 6.

III. DISCUSSION

6. The issue before the Common Carrier Bureau is whether the four transmittals which are the subject of this Order are unreasonably discriminatory. Under Section 202(a) of the Communications Act, discrimination in the provision of "like" services is only prohibited if the discrimination is *unreasonable*. *See* 47 U.S.C. § 202(a). The Commission employs a three-step analysis to determine if a carrier has engaged in unreasonable discrimination.[4] First, the Commission determines whether the services are "like;" second, if the services are like, whether there is a discriminatory price difference; and third, if there is a difference, whether it is reasonable.[5]

7. These transmittals do not raise any "likeness" issues because, as AT&T has acknowledged, the services offered in CPP19, CPP20, CPP21, and CPP22 are the same services described in other AT&T tariffs. *See e.g.*, AT&T Transmittal No. 3143, D&J at 4. In addition, it is clear that there is a price difference between the rates in these plans and the other AT&T tariffs. *Id.* Thus, the remaining issue before the Bureau is whether the price differences established by these plans are unreasonable and therefore prohibited by Section 202(a) of the Communications Act.[6]

8. In an Order adopted on August 1, 1991, the Commission rejected AT&T's second Tariff 15 plan (CPP2) as unreasonably discriminatory.[7] In that Order, the Commission reviewed the pricing mechanism established by Tariff 15, as embodied in the particular plan established by CPP2, and held that the discrimination created therein was unreasonable because of its serious potential anticompetitve consequences. The Commission found that:

> the effect of offering a discounted rate that is available only when (1) a competitor attempts to "underbid" with a similar offer the general rate otherwise applicable to a particular customer; (2) the customer discloses the terms of the competitor's offer to AT&T; and 3) AT&T's uniform response is to meet but not beat its competitor's price, is to undermine price competition in the interstate, interexchange communications services market.

RCI Order at ¶ 14.

9. Each of the four transmittals at issue here establishes the same pricing mechanism, with the same anticompetitive impact, as that established by CPP2 and rejected by the Commission in the *RCI Order*. Although the four plans at issue here discount different telecom-

munication services than those in CPP2, the Tariff 15 pricing mechanism, which applies to these transmittals, would operate in the same fashion as it did in the context of CPP2. Therefore, the Bureau concludes that the discrimination established by the above-captioned transmittals is not reasonable. Accordingly, the Bureau rejects these transmittals as unlawfully discriminatory in violation of Section 202(a) of the Act.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that, pursuant to Section 202(a) of the Communications Act of 1934, 47 U.S.C. § 202(a), the tariff revisions filed by AT&T Communications in Tariff F.C.C. No. 15, Transmittal Nos. 3143, 3163, 3271, and 3279 ARE REJECTED.

11. IT IS FURTHER ORDERED that AT&T Communications SHALL FILE a supplement reflecting these rejections no later than five business days from the release of this Order. Special Permission No. 91-789 is assigned for this purpose.

12. IT IS FURTHER ORDERED that the petitions to reject AT&T Communications Transmittal Nos. 3143, 3163, 3271, and 3279 filed by MCI Telecommunications Corporation and US Sprint Communications Company Limited Partnership ARE GRANTED.

13. IT IS FURTHER ORDERED that the petition to reject or suspend and investigate AT&T Communications Transmittal Nos. 3143 and 3163 filed by the Competitive Telecommunications Association IS GRANTED to the extent indicated herein and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Appendix A: Transmittals, Petitions and Replies

CPP19

AT&T Tariff F.C.C. No. 15, Transmittal 3143, filed May 29, 1991

MCI Petition To Reject, filed June 13, 1991 (MCI CPP19 Petition)

US Sprint Petition To Reject, filed June 13, 1991 (US Sprint CPP19 Petition)

CompTel Petition To Reject or, in the Alternative, To Suspend and Investigate, filed June 13, 1991 (CompTel CPP19 Petition)

AT&T Reply, filed June 24, 1991

CPP20

AT&T Tariff F.C.C. No. 15, Transmittal 3163, filed June 5, 1991

MCI Petition To Reject, filed June 20, 1991 (MCI CPP20 Petition)

US Sprint Petition To Reject, filed June 20, 1991 (US Sprint CPP20 Petition)

CompTel Petition To Reject or, in the Alternative, To Suspend and Investigate, filed June 14, 1991 (CompTel CPP20 Petition)

AT&T Reply, filed July 1, 1991

CPP21

AT&T Tariff F.C.C. No. 15, Transmittal 3271, filed July 10, 1991

MCI Petition To Reject, filed July 25, 1991 (MCI CPP21 Petition)

US Sprint Petition To Reject, filed July 25, 1991 (US Sprint CPP21 Petition)

AT&T Reply, filed August 5, 1991

CPP22

AT&T Tariff F.C.C. No. 15, Transmittal 3279, filed July 12, 1991

MCI Petition To Reject, filed July 29, 1991 (MCI CPP22 Petition)

US Sprint Petition To Reject, filed July 29, 1991 (US Sprint CPP22 Petition)

AT&T Reply, filed August 6, 1991

FOOTNOTES

[1] *See* Appendix A for a list of these transmittals. AT&T identifies these four transmittals as Competitive Pricing Plans (CPP19, CPP20, CPP21 and CPP22, respectively).

[2] *See* Appendix A for a list of the petitions.

[3] AT&T cites the Commission's *Private Line Guidelines* which describe the showing that a carrier can make to justify an otherwise discriminatory volume discount on the grounds of competitive necessity. *See Private Line Rate Structure and Volume Discount Practices*, CC Docket No. 79-246, 97 FCC 2d 923, 948 (1984). The *Guidelines* require a carrier relying on competitive necessity to demonstrate, in essence, that the customers of the discounted offering have a competitive alternative to choose from; the discounted offering responds to competition without "undue" discrimination; and the discount contributes to reasonable rates and efficient services for all users.

[4] *See, e.g., MCI Telecommunications Corp. v. F.C.C.*, 842 F.2d 1296, 1303 (D.C. Cir. 1980).

[5] *Id. See also MCI v. FCC*, 917 F.2d 30 (D.C.Cir. 1990).

[6] *See American Broadcasting Companies v. F.C.C.*, 663 F.2d 133, 139 (D.C. Cir. 1980). *See also Dresser Industries, Inc. v. I.C.C.*, 714 F.2d 588, 599-602 (5th Cir. 1983); *Western Union Int'l, Inc. v. FCC*, 568 F.2d 1012, 1019 n.15 (2d Cir. 1977), *cert. denied*, 436 U.S. 944 (1978).

[7] AT&T Communications, Inc., Tariff FCC No. 15, FCC 91-252, Mimeo 38222, released Sept. 16, 1991 (*RCI Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Pacific Bell Telephone Company — Transmittal No. 1542

Revisions to Tariff F.C.C. No. 128

ORDER

Adopted: September 25, 1991 Released: September 26, 1991

By the Chief, Common Carrier Bureau:

1. On June 28, 1991, Pacific Bell Telephone Company (Pacific Bell) filed Transmittal No. 1542 to revise its Tariff F.C.C. No. 128. Under its proposed Provisioning Commitment Program (PCP), Pacific would automatically credit a customer with the full amount of nonrecurring charges (NRCs) the customer would otherwise have to pay if Pacific fails to meet its confirmed due date for service. D&J at 1. The PCP would apply to all requests for switched and special access services, except DS3, DS3x3, and DS3x12 special access and service arrangements and moves. D&J at 1, 2.

2. The Association for Local Telecommunications Services (ALTS) filed a petition to reject or, in the alternative, to suspend and investigate Tr. 1542. ALTS contends that the NRC credit causes below-cost NRCs, thus violating the requirement that NRCs must be sufficient to recover the full costs of the associated nonrecurring activities. ALTS Petition at 2, *citing* Investigation of Interstate Access Tariff Non-Recurring Charges, 2 FCC Rcd 3498 (1987) (*NRC Order*). It adds that Pacific previously increased its NRCs to full cost to comply with the *NRC Order*. *Id.* at 3, *citing* Pacific Bell 1990 Access Tariff filing, D&J Vol. 1 p. 1A. 3.2. ALTS asserts that the customer should pay for the NRCs since those costs will occur whether or not Pacific meets its due date. *Id.* at 2-3. ALTS further asserts that setting NRCs below cost was forbidden when the Commission stated that NRCs could not be priced for "strategic or other marketing considerations." *Id.* at 4, *citing NRC Order*, 2 FCC Rcd at 3502, and *Private Line and Rate Structure Practices*, 97 FCC 2d 923 (1984). Finally, ALTS charges that the NRC credit allows Pacific to engage in anticompetitive activity by permitting Pacific to provide discounts using premature due dates that would permit rebates to targeted ALTS customers. *Id.* at 3.

3. US Sprint Communications Company Limited Partnership (Sprint) also filed a petition to suspend and investigate, asserting that Pacific's proposed above the-line accounting treatment of NRC credits would cause the NRC credit amounts to flow into the ratemaking process as a cost of doing business, resulting in higher access charges. Sprint concludes that the PCP would not provide further motivation for Pacific to meet its due dates. Sprint argues that Pacific should be required to implement accounting safeguards to ensure that NRC credits are absorbed by the shareholders rather than by ratepayers. Sprint Petition at 1-2.

4. Pacific replies that its NRCs are allowed since fully distributed costs are irrelevant under price caps.[1] Pacific further argues that the price cap regime gives them some degree of pricing flexibility and does not preclude pricing NRCs based on marketing considerations. Pacific Reply to ALTS at 2, *citing LEC Price Cap Order*, 5 FCC Rcd at 6894, and *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2711. Pacific further contends that, under price caps, its rates are not based on expenses but are adjusted annually based on a measure of inflation, a productivity factor, and exogenous changes. Pacific Reply to Sprint at 2, *citing LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2640. It asserts that it has a strong incentive under price caps to minimize costs by meeting or exceeding its current provisioning response, which it claims is between 97 and 100 percent. It adds that Tariff 128 already has above the line accounting provisions in its credit allowance for service interruptions for failures in facilities, lines, trunks or switches of certain duration *Id.* at 2, *citing* Tariff 128 at sec. 2.4.4.

5. Pacific adds that its current access charges, which became effective July 7, 1991, changed NRCs for several products. Finally, Pacific asserts that ALTS has no evidence that Pacific intends to target ALTS customers. *Id.* at 3.

6. The Common Carrier Bureau has reviewed Pacific's Transmittal 1542 and the associated pleadings. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

7. Accordingly, IT IS ORDERED that the motion to accept a late-filed reply to the petition filed by the Association for Local Telecommunications Services, filed by Pacific Telephone Company, IS GRANTED.

8. IT IS FURTHER ORDERED that the petition to reject or, in the alternative, to suspend and investigate, Pacific Telephone Company's Tariff F.C.C. No. 128, Transmittal No. 1542, filed by the Association for Local Telecommunications Services, IS DENIED.

9. IT IS FURTHER ORDERED that the petition to suspend and investigate Pacific Telephone Company's Tariff F.C.C. No. 128, Transmittal No. 1542, filed by the US Sprint Communications Company Limited Partnership, IS DENIED.

[1] Pacific filed a motion to accept a late-filed reply with respect to the ALTS petition. Pacific argues that it did not receive the petition at the time ALTS filed with the Commission, and that it did not obtain a copy of the petition until July 23, 1991. Pacific accordingly filed its reply to the ALTS petition late, although its reply to the Sprint petition was timely. Pacific's motion to accept the late-filed reply is granted.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-279

In the Matter of

Amendment of Section 73.202(b), RM-7808
Table of Allotments,
FM Broadcast Stations.
(Belle Plaine, Kansas)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 18, 1991; Released: October 2, 1991

Comment Date: November 25, 1991
Reply Comment Date: December 10, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by Belle Plaine Broadcasters, Inc. ("petitioner"), requesting the allotment of FM Channel 224C3 to Belle Plaine, Kansas, as that community's first local broadcast service. Petitioner submitted information in support of the proposal and stated its intention to file an application for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration. Channel 224C3 can be allotted to Belle Plaine, Kansas, in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 17.5 kilometers (10.9 miles) southwest of the community.[1] The site restriction will prevent a short spacing with Station KOEZ, Channel 221C1, Newton, Oklahoma and Station KBEZ, Channel 225C1, Tulsa, Oklahoma.

3. In view of the fact that the proposed allotment would provide a first local broadcast service to Belle Plaine, Kansas, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Belle Plaine, Kansas	---	224C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 25, 1991,** and reply comments on or before **December 10, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel as follows:

Leonard S. Joyce
Blair, Joyce & Silva
1825 K Street, N.W., Suite 510
Washington, D.C. 20006

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 224C3 are 37-20-15 and 97-27-56.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-352

In re Applications of

Ronald E. Patterson & Cal E. Varner d/b/a CAPITOL CITY BROADCASTING COMPANY	File No. BPH-880812MZ
INGRAM & SCOTT COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-880816NZ
MATTHEW WILLIAMS	File No. BPH-880816OC

For Construction Permit for New FM Station, Channel 247C2, Longview, Texas

MEMORANDUM OPINION AND ORDER

Adopted: September 23, 1991; Released: October 4, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. Administrative Law Judge Edward J. Kuhlmann (ALJ) denied Matthew Williams' request to enlarge issues against Capitol City Broadcasting Company (CCBC) by *Memorandum Opinion and Order*, FCC 91M-2061, released July 5, 1991. By a subsequent *Memorandum Opinion and Order*, FCC 91M-2229, released July 19, 1991, the ALJ denied Williams' request for leave to appeal his earlier ruling (which refused to add a financial qualification issue against CCBC). Despite the denial of leave to appeal, Williams filed a "Motion for Extraordinary Relief" on July 30, 1991 asking the Board to add the financial issue the ALJ had denied. 47 CFR § 1.301(b) of the Commission's Rules provides that: "appeals of interlocutory rulings of the presiding officer", such as denials of petition to enlarge issues, "shall be filed only if allowed by the presiding officer." We will dismiss Williams' unauthorized appeal because he has not demonstrated that the ALJ has committed egregious error or flagrant abuse of discretion.

2. In essence, Williams' request for enlargement of the issues and for leave to appeal was denied by the ALJ because (*MO&O*, FCC 91M-2229, *supra*, at para. 2):

> [t]o consider Williams' inferential [financial] claims at this stage of the proceeding would be contrary to the rules and Commission policy. *See Great Lakes Broadcasting, Inc.*, FCC 91-198, released July 16, 1991. All of the facts raised by Williams could have been raised a year ago when the applications were designated for hearing. Williams waited until the day of the hearing to do so. The request to appeal will be denied.

3. Williams here acknowledges that he bears "a heavy burden to justify a waiver of the proscription against interlocutory appeals," but argues that his request is supported by *Great Lakes*, on which the ALJ relied. Motion, p. 2. Williams urges that the ALJ:

> [i]s simply wrong. Most of the evidence on which issue enlargement was based is *new* and could not have been discovered earlier because it did not exist. The dispositive facts: the *continuing* failure of CCBC's putative lender to pay property taxes and the insolvency of one of its two general partners, have been occuring over the past several months *and are ongoing*. *Id.* p. 4.

4. Williams also urges that: "Based upon a host of apposite case precedent CCBC's financial qualifications must be considered fully in hearing. Simple justice and the public interest dictate" that they be heard in the present hearing rather than a year and more from now in a Board ordered remand. A grant of its request "will conserve resources and expedite service to the public. *Great Lakes*, *supra*, at para. 4." Motion, pp. 4, 12.

5. An opposition filed by CCBC on August 5, 1991 argues that Williams has not alleged that the ALJ's ruling was the product of egregious error or a flagrant abuse of discretion. CCBC also argues that *Great Lakes* "does not aid Williams" because here the ALJ's actions "comport with the Commission's stern admonishment to ALJs and the Board to strictly enforce all of the provisions of Section 1.229 of the rules. *Great Lakes*, para. 15." Opposition, pp. 2-4.

6. *Carmel Broadcasting Limited Partnership*, 6 FCC Rcd 3287 (1991); *Communications Satellite Corp.*, 32 FCC 2d 533 (1971); *Shawn Phalen*, 5 FCC Rcd 2622 (Rev. Bd. 1990), and *Welch Communications* Inc., 5 FCC Rcd 7066 (Rev. Bd. 1990) are the controlling Commission and Board precedents. They establish that the Board cannot consider this type of unauthorized 47 CFR § 1.301(b) appeal "unless egregious error or flagrant abuse of discretion is shown". *See, e.g.*, Welch Communications, supra, 5 FCC Rcd at 7067. Here, Williams has not attempted to make such a showing. On the contrary, Williams argues that the ALJ "simply erred" in applying *Great Lakes* where the Commission gave guidance about the type of showing which must be made in a late-filed petition to enlarge issues. Absent a strong showing that the ALJ completely ignored, or did not even attempt to conscientiously apply the Commission's recent precedent, we are not empowered to entertain an unauthorized interlocutory appeal. *Cf. Mableton Broadcasting Company, Inc.*, 6 FCC Rcd 396, para. 3, n. 5 (Rev. Bd. 1991). Nor has there been any showing that the present "interlocutory ruling raises far-reaching and vital concerns to the public interest which could not otherwise be adequately protected" on review of the Initial Decision. *Carmel Broadcasting, supra*, at para. 3; 47 CFR § 1.301(b)(1).

7. ACCORDINGLY, IT IS ORDERED, That, pursuant to 47 CFR § 1.301(b)(1), Matthew Williams' Motion for Extraordinary Relief, filed July 30, 1991, IS DISMISSED, and that Williams' Motion for Stay IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of	File Nos. BR-890131VM
Signal Media of Arkansas, Inc.	BRH-890131VL
For Renewal of License of	
Stations KBIS(AM)/KHLT-FM	
Little Rock, Arkansas	

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: September 10, 1991; Released: October 3, 1991

By the Commission:

1. The Commission has before it for consideration: (i) a Petition to Deny timely filed on May 1, 1989, by the National Black Media Coalition, the Arkansas State Conference of Branches of the National Association for the Advancement of Colored People (NAACP), and various local NAACP branches (hereafter "NBMC/NAACP") against the above-captioned renewal application; (ii) an opposition from the licensee; and (iii) the licensee's responses to staff inquiries. NBMC/NAACP allege that the above-captioned station violated the Commission's equal employment opportunity (EEO) Rule and policies. NBMC/NAACP request that the Commission investigate the station's employment practices and designate the renewal application for hearing.

2. *PROCEDURAL MATTERS*. In challenging an application pursuant to Section 309(d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with [the public interest, convenience, and necessity]." 47 U.S.C. Section 309(d)(1); *Astroline Communications Com. Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988)(*Astroline*); *Dubuque T.V. Limited Partnership*, 4 FCC Rcd 1999 (1989) (*Dubuque*). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. Section 309(d)(1).

3. Filed with the petition to deny was a declaration under penalty of perjury from Dale Charles, president of the Little Rock, Arkansas Branch of the NAACP, stating that he is a regular listener of KBIS(AM)/KHLT-FM. We find that Mr. Charles' declaration meets the requirements for establishing standing for his branch and for the Arkansas State Conference of Branches of the NAACP. *See American Legal Foundation v. FCC*, 808 F.2d 84 (D.C. Cir. 1987). Accordingly, we find that the challenge filed by the Arkansas State Conference of Branches of the NAACP and the Little Rock Branch of the NAACP constitutes a valid petition to deny against KBIS(AM)/KHLT-FM.

4. The petition contained a statement under penalty of perjury from the chairman of the NBMC, Pluria W. Marshall, of the Washington, D.C. metropolitan area. The Commission has held previously that an affidavit from a person who does not claim to be a listener of the stations nor a resident of the service areas of the challenged stations does not satisfy the standing requirements of the Act. *See Michigan/Ohio Broadcast Renewals*, 3 FCC Rcd 6944 (1988); *see also KDEN Broadcasting Co.*, 55 Rad. Reg. 2d (P&F) 1311, 1311-1312 (1984). Accordingly, we hold that the NBMC lacks standing to be a petitioner against the stations and we will treat its petition as an informal objection.

5. *DISCUSSION*. Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified women and minorities and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified women and minorities are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See* Sections 73.2080 (b) and (c) of the Commission's Rules, 47 C.F.R. Sections 73.2080 (b), 73.2080 (c).

6. When a renewal application indicates a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When the application indicates inadequate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*Broadcast EEO), petition for reconsideration pending*; *see also* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters). *See e.g., Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont*); *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*).

7. NBMC/NAACP's factual allegations are derived from the stations' EEO programs and Annual Employment Reports. Our review of those documents leads us to conclude that a *prima facie* case concerning non-compliance with our EEO rule was raised as to the stations. *See* 47 U.S.C. Sec. 309(d)(1); *Astroline*, *supra*. However, after evaluating the stations' EEO efforts in light of the licensee's opposition and NBMC/NAACP's arguments, we find that there remain no substantial and material questions of fact requiring a hearing. Thus, grant of the renewal application will serve the public interest. *See* 47 U.S.C. Sec. 309(d)(2); *Astroline*, *supra*. However, we will grant renewal with appropriate sanctions and remedies. Our analysis of the licensee's EEO efforts follows.

8. A review of the licensee's 1989 EEO Program Report, opposition and responses to our inquiries reveals that the licensee had 64 overall and 53 upper-level full-time hiring opportunities from January 1986 until December 31, 1988. The general recruitment sources contacted by the licensee during this period include the *Arkansas Gazette*, *Arkansas Democrat*, seven universities, a business school, a junior college, Little Rock public schools, the Arkansas Broadcasters Association, and the Arkansas Employment Security Division. The licensee

also contacted American Women in Radio and Television. The minority-specific sources contacted during this period include the city and state chapters of the NAACP, the Urban League, Philander Smith College, NBMC, *Southern Mediator Newspaper*, and a Black attorney. The licensee has no records on minority applicants and interviewees, and has incomplete records on how many minorities were referred by each source. The licensee did report, however, that from January 1, 1988, through December 31, 1988, it received four minority referrals from the Arkansas Employment Security Division, three from the *Arkansas Democrat*, and one from a station employee. During the period 1986 through 1988, the licensee hired three minorities: an Hispanic program director and a Black announcer, both upper-level positions, and an Hispanic secretary.[1]

9. NBMC/NAACP assert that no minority recruitment was undertaken by the licensee until the end of the license term. They also allege that the 1988 Annual Employment Report reveals that the licensee includes very few minorities in its applicant pools. They point out that the AM station received reporting conditions during its prior license term and is therefore a recidivist in failing to hire sufficient numbers of minorities.

10. In opposition, the licensee states that it has employed minorities throughout its license term and has contacted minority-specific sources as well as general sources likely to refer minority applicants. It states that it previously had not kept complete records on referrals, applicants and interviewees but that it does now. The licensee also states that one of the reasons it has not consistently employed significant numbers of minorities is because of severe financial problems through its license term. While acknowledging that this is not an excuse for abandoning EEO efforts, the licensee maintains that it has kept up minority recruitment and hiring efforts despite hardships. Regarding the reporting conditions on the AM station, the licensee states that it is not a recidivist because the conditions were imposed on the station's previous licensee and expired before the current licensee obtained the station in April 1981.

11. In view of the foregoing, we find no substantial and material question of fact warranting a hearing. In addition, we find no evidence indicating that the licensee engaged in discrimination. However, the licensee's record of recruiting and hiring minorities through the license term has been inconsistent. Even though the licensee faced a need to improve its recruitment of Blacks since 1985, it maintained almost no records of minority referrals, applicants or interviewees. Inadequate records make it extremely difficult for the licensee to self-assess the effectiveness of its EEO program. Furthermore, the Annual Employment Reports since 1987 show no Blacks, the dominant minority, in upper-level positions and no upper-level minorities at all in 1989. Despite what the licensee describes as economic hardship, it hired 64 new full-time employees in three years. Only one of those hires was Black in a community that is 15.8% Black.

12. We find this licensee's record to be similar to, but worse than, that of WSPA/WSPA-FM of Spartanburg, South Carolina. *Applications of Certain Broadcast Stations Serving Communities in the State of South Carolina*, 5 FCC Rcd 1704 (1990) (*WSPA*). As with KBIS(AM)/KHLT-FM, the licensee of WSPA contacted minority-specific sources but maintained poor records of minority recruitment efforts. Over the last two and one-half years of its license term, the licensee of WSPA hired no Blacks despite 26 full-time hiring opportunities. Over the period January 1986 - December 1988, the licensee of KBIS(AM)/KHLT-FM hired 64 employees, only one of whom was Black. Both of these cases reveal stations that had significant minority employment at the beginning of their license terms but lost most minority employees,[2] had very few (if any) minority hires, and kept poor records of efforts toward the end of their terms. Moreover, KBIS(AM)/KHLT-FM employed fewer Blacks in its combined AM/FM operation than it had when it operated the AM station alone prior to 1985. In *WSPA*, we found that the stations violated Section 73.2080(c)(5) of the Commission's Rules and granted renewal subject to reporting conditions and a $5,000 forfeiture. We find that KBIS(AM)/KHLT-FM's violation of Section 73.2080(c)(5) of the Commission's Rules was significantly more serious than the licensee's violation in *WSPA* because of the greater number of hiring opportunities (64 for KBIS(AM)/KHLT-FM versus 26 for WSPA/WSPA-FM).

13. Accordingly, we will grant renewal subject to reporting conditions and, for repeated failure to comply with the Commission's Rule as outlined above, impose a forfeiture of $8,000.

14. Accordingly, *IT IS ORDERED*, that the petition to deny filed by the Arkansas State Conference of Branches of the NAACP and the Little Rock, Arkansas Branch of the NAACP against Station KBIS(AM)/KHLT-FM *IS DENIED*.

15. *IT IS FURTHER ORDERED* that the informal objection filed by the National Black Media Coalition *IS DENIED*.

16. *IT IS FURTHER ORDERED*, that the license renewal applications for Stations KBIS(AM)/KHLT-FM, *ARE GRANTED* subject to the EEO reporting conditions specified herein.

17. *IT IS FURTHER ORDERED*, that, pursuant to Section 503 of the Communications Act of 1934, as amended, this document constitutes a Notice of Apparent Liability for forfeiture of $8,000 for the licensee of KBIS(AM)/KHLT-FM. [3]

18. *IT IS FURTHER ORDERED*, that the licensee of Stations KBIS(AM)/KHLT- FM, file an original and one copy of the following information on February 1, 1992, February 1, 1993, and February 1, 1994:

(a) For each report, a list of all job vacancies during the twelve months preceding the respective reporting dates, indicating the job title and full or part-time status of the position, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[4]

(b) a list of employees as of the February 1, 1992 payroll period for the first report and as of the February 1, 1993 and the February 1, 1994 payroll periods for the second and third reports, by job title, indicating part-time or full-time status (ranked from the highest paid classification), date of hire, sex and race or national origin;

(c) details concerning the station's efforts to recruit minorities for each position filled during the period specified, including identification of sources used

and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any relevant information with regard to the station's EEO performance and efforts thereunder.

19. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order and Notice of Apparent Liability to the licensee as well as counsel for the NBMC and the NAACP.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The Little Rock MSA is 45.1% female and 17.3% minority, with Blacks comprising 15.8% of the total labor force and Hispanics comprising 0.7%. KBIS(AM)/KHLT-FM's Annual Employment Report (Form 395B) for 1989 indicates that the stations employed 29 employees overall (24 upper-level), of whom two (6.9%) were Blacks in lower-level positions. The licensee reported that one of its upper-level employees reported as a White male in annual employment reports from 1985 - 1988 was actually an American Indian. The following is based on corrected Form 395B data for 1985 - 1988. In 1988, the stations employed 34 employees overall (29 upper-level), of whom three (8.8%) were minorities -- one (2.9%) Black in a lower-level position, and an American Indian and an Hispanic (5.9%), both in upper-level positions. In 1987, the stations employed 29 employees overall (25 upper-level), including four (13.8%) minorities, -- two Blacks (6.9%) and two American Indians. Both American Indians (8.0%) and one Black (4.0%) were upper-level. In 1986, the stations employed 25 employees overall (20 upper-level), including three (12.0%) minorities, two (10.0%) of whom were American Indians in upper-level positions and one (4.0%) of whom was a Black in a lower-level position. The licensee acquired the FM station in April 1985, so the reports prior to 1986 are for the AM station only. In 1985, the AM station employed 14 employees (13 upper-level), including four (28.6%) minorities, --two Blacks (14.3%) and two American Indians. Both American Indians (15.4%) and one Black (7.7%) were upper-level. In 1984, the station employed 22 employees (19 upper-level), including four (18.2%) minorities, -- one American Indian (4.5%) and three (13.6%) Blacks. The American Indian and one (5.3%) of the Black employees were in upper-level positions. In 1983, the station employed 22 employees (20 upper-level), including four (18.2%) minorities --one American Indian (4.5%) and three Blacks (13.6%). The American Indian and one of the Blacks (5.0%) were in upper-level positions.

[2] The Spartanburg labor force is 14.8% Black. WSPA/WSPA-FM employed between 32 and 36 employees during their license term, of whom six (16.7%) were Black in 1983. By 1986, the number of Blacks had declined to two (6.1)%, with one (3.4%) in an upper-level position. In 1987 and 1988, the number of Blacks remained the same although overall employment increased at the stations.

[3] In regard to the forfeiture, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in an attachment to this Memorandum Opinion and Order and Notices of Apparent Liability. Any comments relating to ability to pay should include those financial items set forth in the noted attachment.

[4] Such a list might start: 1) News Director: Officials and Managers; Full-time. 3 Applicants: 1 White female, A.W.R.T.; 1 Black male, Urban League; 1 Black female, NAACP. Sources Contacted - Local Newspaper, A.W.R.T., Urban League, and NAACP. Selected - Black male (08/19/91).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Part 90 Fire Call Box Operations in the 72-76 MHz Band — RM-7783

ORDER EXTENDING COMMENT AND REPLY COMMENT PERIODS

Adopted: September 25, 1991 Released: September 26, 1991

By the Chief, Land Mobile and Microwave Division, Private Radio Bureau:

1. On July 30, 1991, The International Association of Fire Chiefs, Inc. and the International Municipal Signal Association filed a Petition for Rule Making to amend Part 90 of the Rules to permit Fire Radio Service call box operations on the low-power 72-76 MHz frequencies on a coordinated basis with the Forest Products, Special Industrial, Railroad and Manufacturers Radio Services. The Petition was placed on public notice on August 26, 1991. Comments on the petition were due on September 26, 1991, and replies were due on October 11, 1991.

2. On September 19, 1991, the Manufacturers Radio Service Frequency Advisory Committee, Inc. (MRFAC) requested an extension of time to October 25, 1991, in order to respond to the petition. MRFAC states that Counsel for the Petitioner has been contacted and has no objection to its request.

3. Therefore, to permit adequate time for the preparation of meaningful comments, an extension of time is in the public interest. Accordingly, IT IS ORDERED, pursuant to the authority set forth in Section 0.331 of the Commission's Rules and Regulations, 47 C.F.R. § 0.331, that the deadline for filing comments on the subject Petition for Rule Making is extended to October 25, 1991, and for filing reply comments to November 12, 1991.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile and Microwave Division
Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-283

In the Matter of

Amendment of Section 73.202(b), RM-7807
Table of Allotments,
FM Broadcast Stations.
(George West, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 20, 1991; Released: October 3, 1991

Comment Date: November 25, 1991
Reply Comment Date: December 10, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by G & W Radio ("petitioner") requesting the allotment of Channel 228C3 to George West, Texas, as the community's second local FM service. Petitioner states that it will apply for channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 228C3 to George West, Texas, since it could provide the community with its second local FM service. Channel 228C3 can be allotted to George West in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.0 kilometers (7.5 miles) southwest to avoid a short-spacing to vacant Channel 281A, George West.[1] Since George West is located within 320 kilometers (199 miles) of the U.S.-Mexican border, concurrence by the Mexican government has been solicited.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
George West, Texas	281A	228C3, 281A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 25, 1991,** and reply comments on or before **December 10, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lee J. Eidelberg, Esq.
Executive Centre at Hooks Lane
8 Reservoir Circle, Suite 105
Baltimore, Maryland 21208
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 228C3 at George West are North Latitude 28-15-46 and West Longitude 98-12-24.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-178

In the Matter of

Amendment of Section 73.202(b), RM-7141
Table of Allotments,
FM Broadcast Stations.
(Miami Beach, Florida)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 20, 1991; Released: October 3, 1991

By the Assistant Chief, Allocations Branch:

1. Before the Commission is the *Notice of Proposed Rule Making*, 6 FCC Rcd 3654 (1991), issued in response to a petition for rule making filed by Gilmore Broadcasting Corporation ("petitioner") proposing the substitution of Channel 230C for Channel 230C1 at Miami Beach, and modification of its license for Station WLVE(FM) to specify operation on the higher class channel. Petitioner filed comments restating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 230C for Channel 230C1 at Miami Beach, since it could provide the community with an additional wide coverage area FM service. Channel 230C can be allotted to Miami Beach in compliance with the Commission's minimum distance separation requirements without a site restriction.[1] Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we are modifying the license for Station WLVE(FM) to specify operation on Channel 230C.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 18, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Miami Beach, Florida	230C, 235C

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Station WLVE(FM), Miami Beach, Florida, IS MODIFIED, to specify operation on Channel 230C in lieu of Channel 230C1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 230C at Miami Beach are North Latitude 25-47-18 and West Longitude 80-07-48.

Before the
Federal Communications Commission
Washington DC 20554

MM Docket No. 91-182

In the Matter of

Amendment of Section 73.202(b), RM-7733
Table of Allotments,
FM Broadcast Stations.
(Liberty, Kentucky)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 20, 1991; Released: October 3, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 3730 (1991), issued in response to a petition for rule making filed by Carlos Wesley ("petitioner"), permittee of Station WKDO(FM), Channel 254A, Liberty, Kentucky, proposing the substitution of Channel 254C3 for Channel 254A at Liberty and modification of his construction permit to specify the higher powered channel. Petitioner filed comments restating his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 254C3 for Channel 254A at Liberty, since it could provide a wide coverage area FM service to the community. Channel 254C3 can be allotted to Liberty in compliance with the Commission's minimum distance separation requirements at the site specified in the construction permit, with a site restriction of 2.2 kilometers (1.4 miles) southeast of the community.[1] In accordance with Section 1.420(g) of the Commission's Rules, we are herein modifying the construction permit (BPH-891017IB) for Station WKDO(FM) to specify operation on Channel 254C3.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 18, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Liberty, Kentucky	254C3

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit for Station WKDO(FM), Liberty, Kentucky, IS MODIFIED, to specify operation on Channel 254C3 in lieu of Channel 254A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Carlos Wesley, permittee of Station WKDO(FM), is required to submit a rule making fee in addition to the fee required for the application to effect the change of community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 254C3 at Liberty are North Latitude 37-18-22 and West Longitude 84-55-02.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-601

In the Matter of

Amendment of Section 73.202(b), RM-7531
Table of Allotments,
FM Broadcast Stations.
(Lenwood, California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 20, 1991; Released: October 3, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 5 FCC Rcd 7464 (1990), issued in response to a petition filed on behalf of Desert Broadcasting ("petitioner") proposing the allotment of Channel 245A to Lenwood, California, as that community's third local FM service. Petitioner filed supporting comments in response to the *Notice*. No other comments were received.

2. We believe the public interest would be served by allotting Channel 245A to Lenwood, since it would provide the community with an additional local FM broadcast service.

3. As indicated in the *Notice*, Channel 245A can be allotted to Lenwood consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, without the imposition of a site restriction.[1] Additionally, since Lenwood is located within 320 kilometers (199 miles) of the Mexican border, concurrence of the Mexican government to this proposal was received.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 18, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Lenwood, California	245A, 285A, 297A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 245A at Lenwood, California, will open on **November 19, 1991,** and close on **December 19, 1991.**

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Coordinates used for Channel 245A at Lenwood are 34-52-30 and 117-06-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-284

In the Matter of

Amendment of Section 73.202(b), RM-7814
Table of Allotments,
FM Broadcast Stations.
(Independence, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 25, 1991; Released: October 3, 1991

Comment Date: November 25, 1991
Reply Comment Date: December 10, 1991

By the Assistant Chief, Allocations Branch:

1. Before the Commission for consideration is the petition for rule making filed on behalf of Benett Kessler ("petitioner"), permittee of Station KDAY(FM), Channel 292A, Independence, California, proposing the substitution of Channel 223B for Channel 292A at Independence and modification of her permit to specify the non-adjacent, higher powered channel. Petitioner stated her intention to apply for Channel 223B if it is allotted to Independence, as requested.

2. An engineering analysis has determined that Channel 223B can be allotted to Independence consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules at the petitioner's suggested site, located 5.2 kilometers (3.3 miles) east of the community,[1] to avoid short-spacing to Station KFSO(FM), Channel 225B, Visalia, California.[2] As requested, we also propose to modify the petitioner's permit for Station KDAY(FM) to specify operation on Channel 223B. Section 1.420(g)(2) of the Commission's Rules permits the modification of a station's authorization to a non-adjacent, higher powered channel if an additional equivalent class of channel is available for use by other parties which submit competing expressions of interest. In this regard, petitioner states that Channel 288B can be allotted to Independence in the event other parties express an interest in the use of the Class B channel. Channel 288B can be allotted to Independence in conformity with Section 73.207(b), provided the transmitter is located at least 6.2 kilometers (3.9 miles) north of the community,[3] to avoid short-spacing to Station KKXX(FM), Channel 287B, Delano, California, as well as to the construction permit issued on Channel 288A, San Joaquin, California (File No. BPH-850712TE).[4]

3. We believe the public interest would be served by proposing the substitution of Channel 223B for Channel 292A at Independence, California, since it could provide an expanded coverage area FM service to the community. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Independence, California	292A	223B

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **November 25, 1991,** and reply comments on or before **December 10, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Rebecca L. Dorch, Esq.
Bryan, Cave, McPheeters & McRoberts
700 - 13th Street, N.W.
Suite 700
Washington, D.C. 20005-3960

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte*

[1] Coordinates at the site specified by the petitioner for Channel 223B at Independence are 36-48-56 and 118-08-36.
[2] Coordinates at the licensed site of Station KFSO(FM) at Visalia are 36-38-10 and 118-56-34.
[3] Coordinates used for Channel 288B at Independence are 36-51-24 and 118-10-45.
[4] Coordinates at the licensed site of Station KKXX(FM) at Delano are 35-30-53 and 119-03-41. Coordinates at the authorized site for Channel 288A at San Joaquin are 36-40-51 and 120-09-53.

presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-285

In the Matter of

Amendment of Section 73.202(b), RM-7811
Table of Allotments,
FM Broadcast Stations.
(Honolulu, Hawaii)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 25, 1991; Released: October 3, 1991

Comment Date: November 25, 1991
Reply Comment Date: December 10, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Christian Broadcasting Association ("petitioner"), licensee of Station KAIM(FM), Channel 238C1, Honolulu, Hawaii, requesting the substitution of Channel 238C for Channel 238C1 at Honolulu, Hawaii, and the modification of Station KAIM(FM)'s license to specify operation on the higher powered channel. Petitioner states its intention to apply for the channel, if allotted.

2. In support of its proposal, petitioner states that its transmitter is located in a developed area of Honolulu on a tower shared with several AM broadcast stations. However, KAIM's present transmitter site lease expires on December 31, 1991, and the lessor has indicated that as a result of aesthetic protests and RF radiation conditions in the city of Honolulu, KAIM's lease will not be renewed. Therefore, petitioner has located an alternative transmitter site in a less populated area.

3. We believe the public interest would be served by proposing the substitution of Channel 238C for Channel 238C1 at Honolulu since it could provide the community with a wide coverage area FM service and enable Station KAIM(FM) to expand its service area. Channel 238C can be allotted to Honolulu in compliance with the Commission's minimum distance separation requirements with a site restriction of 26.0 kilometers (16.2 miles) west to accommodate petitioner's desired transmitter site.[1] As requested, we also propose to modify petitioner's license for Station KAIM(FM) to specify operation on Channel 238C. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Honolulu or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. Accordingly, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

City	Channel No. Present	Proposed
Honolulu, Hawaii	226C1, 230C1	226C1, 230C1
	234C1, 238C1	234C1, 238C
	248C1, 253C1	248C1, 253C1
	258C1, 262C1	258C1, 262C1
	286C, 290C	286C, 290C

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **November 25, 1991,** and reply comments on or before **December 10, 1991,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Clifford M. Harrington
Matthew P. Zinn
Fisher, Wayland, Cooper & Leader
1255 23rd Street, N.W.
Suite 800
Washington, D.C. 20037-1125
(Counsel for Christian Broadcasting Association)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding.

[1] The coordinates for Channel 238C at Honolulu, Hawaii, are 21-23-42 and 158-05-55.

However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-133

In the Matter of

Amendment of Section 73.202(b), RM-7710
Table of Allotments.
FM Broadcast Stations.
(Wickenburg, Arizona)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 25, 1991; Released: October 3, 1991

By the Assistant Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 6 FCC Rcd 2540 (1991), issued in response to a petition filed on behalf of Circle S Broadcasting Co., Inc. ("petitioner"), proposing the allotment of Channel 229A to Wickenburg, Arizona, as that community's second local FM service. Petitioner filed supporting comments in response to the *Notice*. No other comments were received.

2. We believe the public interest would be served by allotting Channel 229A to Wickenburg since it would provide the community with an additional local FM broadcast service.

3. As indicated in the *Notice*, Channel 229A can be allotted to Wickenburg consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is located at least 7.8 kilometers (4.9 miles) southwest of the community,[1] to avoid a short-spacing to Station KDKB(FM), Channel 227C, Mesa, Arizona,[2] and Station KMGN(FM), Channel 230C, Flagstaff, Arizona.[3] Additionally, since Wickenburg is located within 320 kilometers (199 miles) of the Mexican border, concurrence of the Mexican government to this proposal was received.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **November 18, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Wickenburg, Arizona	229A, 287C1

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. The window period for filing applications on Channel 229A at Wickenburg, Arizona, will open on **November 19, 1991,** and close on **December 19, 1991**.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] Coordinates for Channel 229A at Wickenburg are 33-55-53 and 112-48-12.
[2] Coordinates at the licensed site for Station KDKB(FM) are 33-20-04 and 112-03-36.
[3] Coordinates at the licensed site for Station KMGN(FM) are 34-58-08 and 111-30-28.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re
Applications of Certain
Broadcast Stations
Serving Communities in the
States of Indiana and
Tennessee

MEMORANDUM OPINION AND ORDER

Adopted: August 27, 1991; Released: October 4, 1991

By the Commission:

1. The Commission has before it: (i) the above-captioned license renewal applications for stations WSM/WSM-FM Nashville, TN filed on April 3, 1989 by WSM, Inc. (licensee) (File Nos. BR-890403ZL and BR-890403ZX); WNWZ/WEZI-FM,[1] Germantown, TN, filed on March 30, 1989 by Ardman Broadcasting Corporation (licensee) (File Nos. BR-890330UB and BRH-890330UC); and WFMS(FM), Indianapolis, IN, filed on April 3, 1989 by Radio Indianapolis, Inc. (licensee) (File No. BRH-890403VR)[2] (ii) a Petition to Deny filed July 3, 1989, by the Indiana State Conference of Branches of the NAACP, the Tennessee State Conference of Branches of the NAACP, the respective branches of the NAACP operating within the service areas of the radio stations, and the National Black Media Coalition (NAACP/NBMC); (iii) oppositions to the petition to deny filed by the licensees; and (iv) the licensees' responses to Commission letters of inquiry. NAACP/NBMC allege that the challenged stations violated the Commission's EEO rules and policies. Accordingly, they request that we investigate the stations' employment practices and designate the renewal applications for hearing.

2. *PROCEDURAL MATTERS.* In challenging an application pursuant to Section 309(d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show . . . that a grant of the application would be prima facie inconsistent with (the public interest, convenience and necessity)." 47 U.S.C. Section 309(d)(1); *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*); *Dubuque Limited Partnership*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. Section 309(d)(1).

3. The licensee for WSM/WSM-FM asserts that, by failing to file supporting affidavits regarding these stations, petitioners have not established standing. Petitioners have not produced a statement from either NAACP or NBMC for WSM/WSM-FM. In addition, with respect to WFMS(FM), NAACP filed an untimely declaration signed by Dr. A.D. Pinckney, a listener of the station on July 17, 1989. As we stated in *Applications of Certain Broadcast Stations Serving Communities in the State of Florida*, 3 FCC Rcd 1930 (1988), we will not acquiesce to petitioners' habit of submitting late filings for nonsubstantial reasons. Accordingly, pursuant to Section 73.3584(b) of the Commission's Rules, 47 C.F.R. Section 73.3584(b), NAACP will be considered an informal objector in its challenge against WSM/WSM-FM and WFMS(FM) and a petitioner with respect to the other stations.

4. With respect to NBMC, NBMC timely submitted a statement from Pluria Marshall, Chairman of the NBMC and a resident of the Washington, D.C. metropolitan area. However, the Commission has previously held that the statement of a person who does not claim to be a listener of the stations nor a resident of the service areas of the challenged stations does not satisfy the requirements of the Act. *See Michigan/Ohio Broadcast Renewal*, 3 FCC Rcd 6944 (1988); *see also KDEN Broadcasting Co.*, 55 Rad. Reg. 2d (P&F) 1311, 1311-1312 (1984). Accordingly, we hold that NBMC lacks standing to petition against any of the stations in question except WNWZ/WEZI-FM, for which it has filed a timely statement from Gwen Sneed, a member of the Memphis Black Media Coalition and a listener of that station. We therefore will treat NBMC's pleading as a petition to deny with respect to WNWZ/WEZI-FM, but as an informal objection with respect to the other stations.

5. *DISCUSSION.* Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ, and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified women and minorities and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified women and minorities are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See* Section 73.2080 (b) and (c) of the Commission's Rules, 47 C.F.R. Sections 73.2080(b), 73.2080(c).

6. When a renewal application indicates a record of adequate EEO efforts, the application is granted, if otherwise appropriate. If the application indicates a record of inadequate EEO efforts, the Commission will impose a variety of sanctions and remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the renewal application for a hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (*Broadcast EEO), petition for reconsideration pending*; *see also* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters). *See e.g., Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501 (D.C. Cir. 1988) (*Beaumont*); *Bilingual-Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*).

7. Information initially before the Commission, including the renewal applications and the annual employment reports, indicated that further inquiry was necessary except as to stations WNWZ/WEZI-FM. [3] *See Beaumont, supra*; *Bilingual, supra*. However, upon subsequent analysis of the petition, related pleadings and the licensees' oppositions and responses to our inquiries, we conclude that no

substantial and material questions of fact remain as to whether the licensees of any of the challenged stations discriminated or otherwise failed to comply with our EEO requirements. *Astroline, supra*. Thus, NAACP/NBMC have failed to demonstrate that unconditional grant of the applications for renewal would be inconsistent with the public interest. *Astroline, supra*. Accordingly, designation for hearing is not warranted for any of the renewal applications addressed herein. We also find that unconditional grant of these renewal applications will serve the public interest.

WSM/WSM-FM, Nashville, TN

8. A description of the licensee's EEO efforts is detailed in the stations' 1989 EEO Program Report and their opposition to the NAACP/NBMC's informal objection. During the period from March 1, 1986 to February 28, 1989, the licensee had 29 overall hiring opportunities and 24 upper-level hiring opportunities for full-time employees.[4] The recruitment sources contacted by the licensee include:[5] *Nashville Tennessean*: employee referrals (two minorities); 28 educational institutions;[6] and 40 organizations (two minorities).[7] In addition, three minorities came to the stations as walk-in applicants. A total of 15 minorities applied for the 29 overall positions, including 12 minorities who applied for the 24 upper-level positions. The data also show that four minorities were interviewed for the 29 overall positions while three minorities were interviewed for the 24 upper-level positions.[8] One Black was hired for a full-time upper-level position between March 1, 1986 and February 28, 1989.[9] The licensee apparently assessed its efforts during the license term as its recruitment lists indicate that modifications were made during the license term. In addition, the licensee reports that it has established an internship program with Tennessee State University with the hope of developing the program into an additional source for permanent minority and female recruitment. Furthermore, the licensee reports that it has made changes to its computerized database and job applicant information system to enhance minority recruitment capabilities.

9. NAACP/NBMC assert that although the stations have exceeded our guidelines, they have failed to maintain a successful and reasonable EEO program. NAACP/NBMC point out that the stations have maintained an upper-level minority workforce of six throughout the license term. Noting that the licensee claims to have contacted many recruitment sources that produced very few female and minority applicants, NAACP/NBMC submit that this could not have happened had all of the organizations actually been contacted. Finally, NAACP/NBMC assert that the licensee relied unreasonably on walk-ins and employee referrals as affirmative action recruitment sources since these resources appear to be the largest sources for potential employees.

10. Conversely, the licensee contends that the stations have had an aggressive EEO Program. It argues that it has posted notices of job openings with each source identified in the renewal applications for all but four positions identified in the renewal applications.[10] In addition, the licensee states that the stations broadcasted announcements designed to attract minority applicants and placed advertisements in the *Nashville Tennessean*. Furthermore, the licensee argues that it contacted universities with large minority enrollments and InRoads, Inc. concerning the establishment of an internship program.[11] The licensee denies NAACP/NBMC's assertion that the stations have a quota for minority hires. In its opposition, the licensee explains that since March 1, 1986, three upper-level minority employees have left the stations at various times while other minorities were promoted and hired to upper-level positions. The licensee asserts that these promotions and hires occurred at different times and for different positions and maintains that it has aggressively endeavored to employ minorities in upper-level positions. Although the licensee acknowledges that walk-ins and employee referrals have been excellent referral sources, it denies relying solely on these avenues for referrals. The licensee states that since the stations are owned by Opryland, USA, Inc., the owner of nationally syndicated "The Nashville Network," it receives an unusually high volume of unsolicited applications. In addition, due in part to a self-selection process, the licensee hires a large number of employees as a result of employee referrals.[12] Lastly, the licensee argues that it has implemented improvements in its recordkeeping procedures.

11. Upon analysis of the licensee's opposition and responses to our inquiries, we conclude that no substantial and material questions of fact remain to be resolved. *Astroline, supra*. Our review indicates no evidence of discrimination, nor do we find a record of inadequate efforts to recruit and hire minorities. Accordingly, designation for a hearing is not warranted. In addition, because we find that unconditional grant of its renewal applications will serve the public interest, sanctions or prospective remedies are unwarranted. Although the licensee has hired very few minorities during the license term, its records show that meaningful efforts were made. The licensee contacted a number of general and minority specific organizations during the term. The licensee acknowledges that it has had problems attracting minorities and has made modifications to its current list of recruitment sources.[13] In addition, the licensee has contacted minority organizations and institutions about establishing internship programs with the hope of using these programs as additional recruitment sources. Lastly, the licensee proposes to make changes in order to improve its EEO recordkeeping.

12. We find this case to be distinguishable from KETS(TV) where we granted renewal subject to reporting conditions because the record showed that the station failed to properly assess its EEO program. *Arkansas Educational Television Commission*, 3 FCC Rcd 1923, 1925 (1988). Both licensees contacted numerous sources for referrals. KETS(TV) did not engage in self-assessment, however, and continued to use past unproductive referral sources. By contrast, WSM/WSM-FM engaged in self-assessment by tracking its referrals and using new sources. Based on the foregoing, we find that there is no need to impose sanctions or remedies at this time.

WNWZ/WEZI-FM, Germantown, TN

13. Review of the stations' 1989 EEO Program Report and their opposition indicates that the licensee had twelve overall hiring opportunities and ten upper-level hiring opportunities for full-time employees during June 1988 to May 1989.[14] The recruitment sources contacted by the licensee for the above-noted openings are as follows: Memphis Commercial Appeal (six minorities); Tennessee Department of Employment Security; employee referrals; Columbia School of Broadcasting (two minorities); WEZI Radio (three minorities); Memphis State University (one

minority); Shelby State Community College; LeMoyne Owen College; Memphis Urban League (one minority); NAACP-Memphis Branch; and Operation P.U.S.H.-Memphis and the American Women in Radio & Television. A total of 30 minorities (29 Blacks and one Hispanic) applied for the 12 overall positions, including 23 minorities who applied for the ten upper-level positions.[15] The licensee interviewed a total of 21 minorities (20 Blacks and one Hispanic) for the positions, including 18 minorities (17 Blacks and one Hispanic) for the ten upper-level positions. The licensee hired four minorities (two Blacks, one Hispanic, one Asian) between June 1988 and May 1989.[16] The stations kept records on each source contacted; minority applicants for overall, as well as upper-level positions, minority applicants interviewed for overall and upper-level positions, and minorities hired. Accordingly, we find that the licensee has maintained adequate records for self-assessment.

14. NAACP/NBMC allege that the licensee failed to use any minority organizations or newspapers as it had proposed to do in its 1987 assignment application. Furthermore, they assert that the licensee's hiring of minorities constitutes nothing more than tokenism. The licensee responds that its efforts to recruit minorities included sending job announcements to various resources including minority organizations and educational institutions with significant Black enrollment. The licensee further argues that its failure to use Black newspapers is due to its assessment that a sufficient number of minorities were responding to announcements placed in general newspapers, thus making contact with Black newspapers unnecessary. Lastly, the licensee argues that it has reached and in some cases surpassed the Commission's guidelines for hiring, and thus it disputes NAACP/NBMC's arguments that its hiring practices constitute tokenism.

15. We find no evidence of discrimination by the licensee. Furthermore, we do not find a record of inadequate EEO efforts. According to a declaration from the stations' office manager, the stations have contacted a number of minority and female organizations for "each job opening that has become available since February 1987."[17] The licensee further states, "[t]he only time this procedure was not utilized was when positions are able to be immediately filled through utilization of existing station employees, walk-ins, etc."[18] Although the stations did not use a Black newspaper in their recruitment efforts, it appears that they did receive a sufficient number of responses from other resources.

16. Based on the foregoing, we conclude that no substantial and material questions of fact remain to be resolved. *Astroline*, *supra*. Accordingly, designation for hearing is not warranted. In addition, we find that unconditional grant of its renewal applications will serve the public interest, thus we will not impose sanctions or prospective remedies at this time.

WFMS (FM), Indianapolis, IN

17. Review of the station's 1989 EEO Program Report, its opposition, and inquiry response indicates that the licensee had ten hiring opportunities overall, including nine upper-level hiring opportunities for full-time employees during the period March 1, 1986 to March 1, 1989.[19] The recruitment sources contacted by the licensee for the above openings are as follows: *Indianapolis Star Newspaper* (one minority); *Radio and Records*; 15 educational institutions;[20] 22 community organizations (one minority);[21] and 11 state agencies.[22] The licensee interviewed six minorities, some of whom were considered for more than one position. It hired no minorities between March 1, 1986 and March 1, 1989.[23]

18. By way of background, we imposed reporting conditions on WFMS(FM) in 1983 because of the licensee's deficient EEO program during the preceding license term. *See Applications of Certain Broadcast Stations Serving Communities in the States of Indiana, Kentucky and Tennessee*, 54 R.R.2d 1473 (1983). In February 1986, we lifted these reporting conditions when the station submitted an affirmative action program which resulted in the recruitment and hiring of minorities for full and part-time positions.

19. NAACP/NBMC argue that the licensee dropped its affirmative action program once reporting conditions were lifted. It notes that during the reporting conditions, recruitment sources were called for each vacancy, minority organizations were sent referrals, EEO information was collected from each applicant and minorities without experience were trained. However, when conditions were lifted, several job sources including WTLC Job Line and the *Indianapolis Recorder*, a Black-oriented newspaper, were dropped, minorities were not hired or trained and minority referrals were not received.

20. The licensee, however, contends that, from 1984 through 1989, it has consistently met, and often exceeded, the Commission's processing guidelines in both overall and upper-level positions. In response to NAACP/NBMC's claim that the station did not hire any minorities in 1988, the licensee argues that this fact is of no consequence since "the minority component of the Indianapolis MSA workforce is only 13.2%." The licensee argues that it would need to hire only one minority to have a minority hiring ratio which represented 200% of parity. In response to the allegation that it dropped recruitment sources after the reporting conditions were lifted, the licensee notes that it used 39 EEO sources during the renewal period. It explains that it never used *Indianapolis Recorder* on a continuous basis and ceased to use WTLC because it generally did not generate any referrals.[24] In response to NAACP/NBMC's allegation regarding its recordkeeping, the licensee argues that, in preparing its opposition, it discovered that its methods of keeping records had not changed and that it maintains adequate applicant pool information by collecting race/sex/referral source information from all applicants interviewed for positions.

21. Our analysis of the licensee's opposition and inquiry response indicates that no substantial or material questions of fact remain to be resolved. *Astroline*, *supra*. We will not, therefore, designate this application for a hearing. In addition, because our review shows no evidence of discrimination or lack of adequate efforts, we will not impose sanctions or prospective remedies at this time. Although the station is not hiring many minorities,[25] it does appear to be making sufficient efforts to recruit minorities. The licensee contacted numerous referral sources for the above-noted ten positions and considered minority applicants for seven of those positions. We find this case to be distinguishable from other cases where we have imposed reporting conditions for a subsequent license period on licensees who failed to use best efforts in recruiting minorities. *See Application of Tulsa 23 For Renewal of License of Station KOKI-TV Tulsa, Oklahoma*, 4 FCC Rcd 2067 (1987) (*KOKI-TV*); *Catawba Valley*

Broadcasting Company, 3 FCC Rcd 1913 (1988) (*WUNC-TV*). In *KOKI-TV*, *supra*, we imposed reporting conditions for a subsequent license term on a licensee which failed to attract any potential minority candidates from either its general or minority referral sources and failed to include minorities in any of the applicant pools for the nine hiring opportunities. These failures resulted in an absence of hires during the renewal period -- the only time when the licensee was not subject to reporting conditions. In *WUNC-TV*, *supra*, we imposed reporting conditions because the licensee failed to adequately analyze its EEO program with respect to minorities in upper-level positions and, therefore, was in no position to modify its employment practices for either overall or upper-level positions. Furthermore, the licensee did not indicate what areas of its employment profile it planned to modify to ensure that minorities were recruited and considered for vacancies. By contrast, the licensee of WFMS(FM) has made some efforts to ensure that minorities were considered for vacancies. The licensee contacted sources for each position and, unlike *KOKI-TV*, WFMS(FM) considered minorities for seven of its ten vacant full-time positions. Furthermore, the station's efforts did result in a minority hire, albeit within the last four months of the license term. Lastly, unlike *WUNC-TV*, the licensee made changes to its employment practices where necessary in that the record shows a continuous expansion of recruitment sources. Furthermore, the station collects information from interviewees regarding their sex, race and referral source. The station, therefore, is able to maintain adequate records for self-assessment. Based on the foregoing, we will grant the licensee's renewal application without imposing sanctions or remedies.

22. Accordingly, *IT IS ORDERED* that the petition to deny filed by the National Black Media Coalition regarding WNWZ/WEZI-FM and the informal objection against the remaining stations *ARE DENIED*.

23. *IT IS FURTHER ORDERED*, that the petition to deny filed by the NAACP regarding stations WNWZ/WEZI-FM and the informal objection against WSM/WSM-FM and WFMS(FM) *ARE DENIED*.

24. *IT IS FURTHER ORDERED* that the license renewal applications filed by WSM, Inc. for WSM/WSM-FM, by Ardman Broadcasting of Tennessee for WNWZ/WEZI-FM, and by Radio Indianapolis, Inc. for WFMS(FM) *ARE GRANTED*.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Ardman Broadcasting Corporation acquired the stations on February 6, 1987. WEZI(AM)'s call sign was changed to WNWZ(AM) on October 31, 1989.

[2] In their petition, NAACP/NBMC also challenged the renewal applications of WQMF(FM), Jeffersonville, IN, (File No. BRH890331XQ), filed by Otting Broadcasting Company on March 31 1989; WTJS/WTNV(FM), Jackson, TN (File Nos. BR-890327UX and BRH-890327UY) filed by Currey Broadcasting Company on March 27, 1989; WSIX/WSIX-FM, Nashville, TN (File Nos. BR-890303UZ and BRH-890403XA) filed by Hicks Broadcasting Partners of Tennessee, L.P. on April 3, 1989; WZEZ(FM), Nashville, TN (File No. BRH-890331WU) filed by South Central Communications, Inc. on March 31, 1989; and WGOW/WSKZ(FM), Chattanooga, TN (File Nos. BR-890322UQ and BRH-890322UG) by Radio Chattanooga, Inc. In addition, NAACP/NBMC challenged the applications for assignment for WSIX/WSIX-FM, (File Nos. BAL-890522GW and BALH-890522GX) from Hicks Broadcasting Partners of Tennessee, L.P. to Capstar Communications, Inc.

NAACP/NBMC withdrew their challenge against WTJS/WTNV(FM) on January 9, 1990 and the Commission granted these stations' renewal applications on on December 19, 1990. In addition, NAACP/NBMC withdrew their petition challenging assignment applications for WSIX/WSIX-FM. The Commission granted these stations' renewal applications on September 18, 1989 and consummated the stations' applications for assignment on November 21, 1989.

[3] None of the stations were challenged regarding their recruitment of women. Nonetheless, as is our practice in all cases, we reviewed each station's EEO efforts toward both women and minorities. We find each station's record of recruiting women sufficient.

[4] The licensee also lists one unfilled position and 18 internal promotions or transfers. Promotions and transfers are not counted as new hires.

[5] The numbers represent minority and female referrals obtained during the year preceding the filing of the renewal application. It is therefore possible that more minority and female referrals were obtained during the license term.

[6] Austin Peay State University; Belmont College; Cumberland University at Lebanon; Fisk University; David Lipscomb College; Middle Tennessee State University at Murfreesboro; Nashville Tech; Northwest Missouri State University at Maryville; Tennessee State University; University of Tennessee at Knoxville; University of Tennessee at Martin; Davidson Technical College; Grambling State University; Howard University; Illinois Institute of Technology, Women in Science and Engineering; Kansas University, Memphis State University; Northwestern University; Shelby State Community College; Trevecca Nazarene College; United Technical Institute; University of Miami; Vanderbilt University; Volunteer State Community College; Western Kentucky University; Murray State University; and Vanderbilt University, School of Engineering, Minority and Women's Engineering Program.

[7] American Women in Radio & TV; AVCO Dept.; Base Camp, Inc.; Department of Employment Security; General Services & Products, Inc.; Goodwill Industries; Vocational Education, Metro Department of Education, Metro Dept. of Personnel, Office of Handicapped Persons; Mid-Cumberland HRA; NAACP; Nashville Chapter, NOW; Oasis Center; TAPS; YWCA; Bethlehem Center; Employment Outreach Project; Dept. for Public Broadcasting; Hispanics in Communications; National Asian American Telecommunication Association; National Association of Black Journalists; NAB Employment Clearing House; National Association of Media Women, Inc.; National Black Media Coalition; National Council of Negro Women; National Federation of Hispanics in Communications; Native American Broadcasting Consortium, Inc.; Senior Citizens, Inc.; Storer Broadcasting Company; TN Association of Broadcasters; United Negro College Fund; Wider Opportunities for Women; YMCA; Classified Communications; Latino Consortium; National Association of Black

Owned Broadcasters; TN Dept. of Employment Security, Employer Development Unit; Women in Communications and Women's International News Gathering Service.

[8] The licensee provided interview pool information for only 14 positions which were filled between July 1987 and February 1989.

[9] The Nashville, TN PMSA, in which the stations are located, has an available labor force which is 15.4% minority (14.3% Black, 0.5% Hispanic, 0.4% Asian/Pacific Islander, 0.1% American Indian.). The 1989 Annual Employment Report lists nine (14.75%) Blacks among 61 overall full-time employees and six (12.5%) Blacks among 48 upper-level employees. The 1988 report lists ten (16.9%) Blacks among 59 overall employees and six (12.8%) Blacks among 47 upper-level employees. The 1987 report lists ten (18.2%) Blacks among 55 overall employees and six (14%) Blacks among 43 upper-level employees. The 1986 report lists 11 (20%) Blacks among 55 overall employees and six (13.6%) Blacks among 44 upper-level employees. The 1985 report lists 12 (22.2%) Blacks among 54 overall employees and six (14.3%) Blacks among 42 upper-level employees.

[10] The licensee indicates that two of the non-posted positions were merit-based promotions of existing WSM employees. A third position was filled by an employee referral from an affiliated company and the fourth was a self-referral for a sales position who was hired on the spot by the stations' general manager, although no position was vacant. In addition, the licensee did not actively recruit for its general manager position in December 1986.

[11] The licensee states that InRoads, Inc. is a national internship program dedicated to placing minority youth in corporate sponsored business internships. The licensee also argues that it has received additional minority referrals from Davidson Technical College (one), Tennessee State University (one) and the Nashville Urban League (three). These referrals, however, were received irrespective of specific job postings.

[12] The self-selection process allows an employee with knowledge of the specific job requirements to identify a candidate who has many of the requisite qualifications. Out of the 29 hiring opportunities, the station interviewed 13 applicants referred by employees, 12 applicants from walk-ins and four applicants from outside referrals.

[13] The licensee's list of changes effective June 1989 include the following additions: Classified Communications; Latino Consortium, Los Angeles, CA; NAACP; Nashville Chapter, NOW; National Association of Black Owned Broadcasters; Tennessee Department of Employment Security, Employer Development Unit; Women in Communications, Inc..; Women's International News Gathering Service; Murray State University; Vanderbilt University, School of Engineering, Minority and Women's Engineering Program; and the following deletions: Hispanics in Communications; Oasis Center; and Storer Broadcasting Company.

NAACP, Tennessee Department of Employment Security, Vanderbilt University and Nashville Chapter of NOW have appeared on previous lists. The licensee, however, dropped NAACP and the Nashville Chapter of NOW from its list in November 1988. It appears to have chosen to use these sources again. Although Tennessee Department of Employment Security and Vanderbilt University have been included on other lists, it appears that these are special programs within these organizations -- programs which have not been used previously.

[14] The licensee also lists three promotions. Promotions are not counted as new hires.

[15] The stations actively recruited for ten of the 12 new hires. Thus, all applicant and interview pool information is based on those ten positions. Information on new hires and resources is based on all 12 positions.

[16] The Memphis MSA, in which the stations are located, has an available labor force which is 33.6% minority (32.4% Black, 0.7% Hispanic, 0.4% Asian/Pacific Islander, 0.1% American Indian). The licensee's 1989 Annual Employment Report lists four (22.2%) Blacks, one (5.6%) Hispanic and one Asian/Pacific Islander among 18 overall employees and two (13.3%) Blacks and one (6.7%) Hispanic among 15 upper-level employees. The 1988 Annual Employment Report lists three (16.7%) Blacks among 18 employees overall and in upper-level positions. The 1987 report lists four (28.6%) Blacks among 14 employees overall and in upper-level positions.

[17] *See* Declaration of Carolyn Chaffen, Office Manager at WNWZ(AM)/WEZI-FM dated August 1, 1989. Ms. Chaffen is responsible for implementation of the stations' Equal Employment Opportunity Program.

[18] *See id.* The stations did not actively recruit for five positions. Three of these positions were promotions and, therefore, are not counted as new hires. One position was filled by an Asian female who was referred from an employment agency. The other position was filled by a walk-in. These latter two positions are counted as hiring opportunities although the stations did not actively recruit for them.

[19] The licensee also lists one promotion. Promotions are not counted as new hires. The licensee also indicates that it filled seven positions after March 1, 1989 through July 24, 1989. It does not, however, specify the number of full-time hires.

[20] Ball State University; Butler University; Indiana University; Purdue University; Aristotle College; Clark College; Columbia School of Broadcasting; ITT Technical Institute; Ivy Tech; Indiana Business College; International Business College; Lockyear College; Professional Careers Institute; PSI Institute; Wilson College.

[21] American Indian Business Association; American Women in Radio and Television; Hispano American Center; Indianapolis Employment and Training; NAACP; NAB Employment Clearing House; National Association of Media Women; National Council of Negro Women; NOW; Near Eastside Employment Center; Opportunities Industrialization; Project Equality of Indiana; Southern Christian Leadership Conference; The Indianapolis Plan; United Neighborhood Training; Urban League; Womens Educational and Industrial Union; Indianapolis Black Media Coalition; National Black Media Coalition; Indiana Black Expo; Network One; and IDETS.

[22] Civil Rights Commission; Equal Employment Office; Human Rights Commission; IUPUI; and seven offices of the Indiana Employment Security Division.

[23] The Indianapolis MSA, in which the station is located, has an available labor force which is 13.5% minority (12.1% Black, 0.7% Hispanic, 0.5% Asian-Pacific Islander, 0.2% American Indian). The licensee's 1989 Annual Employment Report lists one (4%) Black and one Hispanic out of 25 overall employees and lists one (4.5%) Black and one Hispanic among 22 upper-level employees. The 1988 report lists one (3.8%) Black and one Hispanic among 26 overall employees one (4.2%) Black and one Hispanic among 24 upper-level employees. The 1987 report list one (3.8%) Black and Hispanic among 26 overall employees and one (4.3%) Black and Hispanic among 23 upper-level employees. The 1986 report lists two (7.4%) Blacks and one (3.7%) Hispanic among 27 overall employees and two (8.7%) Blacks and one (4.3%) Hispanic among 23 upper-level employees. The 1985 report lists two (7.4%) Blacks and one (3.7%) Hispanic

among 27 overall employees and two (8.3%) Blacks and one (4.2%) Hispanic among 24 upper-level employees. The 1984 report lists two (8.3%) Blacks among 24 employees overall and two (10%) Blacks among 20 upper-level employees. The 1983 report lists one (4%) Black among 25 employees overall and one (4.76%) Black among 21 upper-level employees.

[24] The licensee explains that the station's contacts with WTLC were all informal. They, therefore, did not include it on the list of recruitment sources in the station's renewal application.

[25] The station reported two Blacks in its 1985 and 1986 Annual Employment Reports. The station, however, reported only one Black employee in its 1988 and 1989 reports. In addition, the only minority hire after reporting conditions were lifted occurred within less than four months left in the license term.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SOUTHERN CALIFORNIA
RAPID TRANSIT
DISTRICT

ORDER
(Proceeding Terminated)

Adopted: September 20, 1991; Released: October 4, 1991

By the Commission:

1. On December 1, 1989, this Commission adopted a *Memorandum Opinion and Order* (*MO&O*) making five channels formerly licensed to the Taylor Bus Service, Inc. (TBS) available for assignment to the Southern California Rapid Transit District (SCRTD).[1] Numerous pleadings were subsequently filed challenging the *MO&O*, including a Joint Request for Stay filed by Southern California Gas Company (SCG) and Dennis B. Schmucker, Trustee for TBS (Trustee),[2] Petitions for Reconsideration filed by SCG,[3] the Trustee,[4] Aeronautical Radio, Inc (ARINC)[5] and the National Association of Business and Educational Radio, Inc. (NABER),[6] a Consolidated Opposition and Request for Commission Action filed by SCRTD,[7] and Replies filed by SCG,[8] the Trustee[9] and NABER.[10] In addition, following the release of the *MO&O*, SCRTD applied to be licensed for the five channels. SCRTD's license application was challenged in Petitions to Deny filed by the Trustee,[11] SCG[12] and ARINC.[13]

2. While the above pleadings were pending before the Commission, the Trustee initiated an adversarial proceeding in bankruptcy court challenging the Commission's cancellation of fifteen channels formerly licensed to TBS, including the five channels made available for SCRTD in the *MO&O*, and naming the Commission as defendant.[14] On October 26, 1990, an agreement was executed between the Commission, the Trustee and SCG settling the bankruptcy proceeding.[15]

3. On November 21, 1990, this Commission granted requests filed by SCG and the Trustee for the withdrawal of their pleadings challenging the action taken in the *MO&O*.[16] Also on that date, we granted SCRTD's request for withdrawal of its Consolidated Opposition and Request for Commission Action [17] and the Trustee's request for reinstatement of the licenses for the fifteen frequencies previously issued to TBS.[18]

4. The only filings stemming from the *MO&O* still pending before this agency are the Petitions for Reconsideration filed by ARINC and NABER, NABER's Reply, and ARINC's Petition to Deny. Because the subsequent action in this proceeding renders the *MO&O* moot, these pleadings are moot as well and are dismissed. *See, e.g., Amendment of Section 73.202(b),* RM-5657, 5 FCC Rcd 7252 (1990). In addition, the *MO&O* in the instant proceeding is vacated as moot.

5. Accordingly, IT IS ORDERED that the above-mentioned pleadings filed by ARINC and NABER are hereby DISMISSED as moot and that the *Memorandum Opinion and Order* in this proceeding, adopted December 1, 1989, is VACATED as moot.

6. IT IS FURTHER ORDERED that this proceeding is TERMINATED.

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[1] In re Southern California Rapid Transit District, FCC No. 89-332, 4 FCC Rcd 8654 (1989).

[2] Southern California Gas Company and Dennis B. Schmucker, Trustee, Taylor Bus Service, Inc., Joint Request for Stay (January 19, 1990).

[3] Southern California Gas Company, Petition for Reconsideration (January 19, 1990).

[4] Dennis B. Schmucker, Trustee, Taylor Bus Service, Inc., Petition for Reconsideration (January 19, 1990).

[5] Aeronautical Radio, Inc., Petition for Reconsideration (January 19, 1990).

[6] The National Association of Business and Educational Radio, Inc., Petition for Reconsideration (January 19, 1990).

[7] Southern California Rapid Transit District, Consolidated Opposition and Request for Commission Action (February 12, 1990).

[8] Southern California Gas Company, Reply Comments (March 2, 1990).

[9] Dennis B. Schmucker, Trustee, Taylor Bus Service, Inc., Reply Comments (March 2, 1990).

[10] The National Association of Business and Educational Radio, Inc., Reply Comments (March 2, 1990).

[11] Dennis B. Schmucker, Trustee, Taylor Bus Service, Inc., Petition to Deny (February 12, 1990).

[12] Southern California Gas Company, Petition to Deny (February 1, 1990).

[13] Aeronautical Radio, Inc., Petition to Deny (February 12, 1990).

[14] Dennis B. Schmucker, Trustee, Taylor Bus Service, Inc. v. FCC, Chapter 11 Case No. SA88-02747JB and Adversary Case No. SA90-0241JB (Bankr. C. D. Cal) (February 13, 1990).

[15] Agreement for Settlement and Dismissal with Prejudice (October 26, 1990).

[16] Southern California Gas Company, Request for Withdrawal of Petition for Reconsideration and Joint Request for Stay and Reply to Opposition of Southern California Rapid Transit District and Supplement Petition for Reconsideration (November 1, 1990); Dennis B. Schmucker, Trustee, Taylor Bus Service, Inc., Request for Withdrawal of Petition for Reconsideration and Joint Request for Stay and Reply to Opposition of Southern California Rapid Transit District (November 1, 1990). Southern California Gas Company, Request for Withdrawal of Petition to Deny (November 1, 1990); Dennis B. Schmucker, Trustee, Taylor Bus Service, Inc., Request for Withdrawal of Petition to Deny (November 1, 1990).

[17] Southern California Rapid Transit District, Notice of Withdrawal of Consolidated Opposition to Petitions for Reconsideration, Petition to Deny, and Joint Request for Stay (October 30, 1990).

[18] Dennis B. Schmucker, Trustee, Taylor Bus Service, Inc., Request for Reinstatement of Licenses for Stations WNJR 566, WNIZ 682 and WNJU 973 (October 31, 1990). The Trustee's concomitantly filed Request for Involuntary Assignment of Licenses for Stations WNJR 566, WNIZ 682, and WNJU 973 (October 31, 1990), was also granted on November 21, 1990, transferring TBS's licenses to the Trustee pursuant to the Chapter 11 proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Max Marcott,
Complainant,

v. File No. E-87-05

Continental Telephone
Company of the Northwest,
Defendant.

ORDER

Adopted: September 30, 1991; Released: October 4, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On December 1, 1986, Max Marcott (hereinafter "Marcott") filed the above-captioned formal complaint against Continental Telephone Company of the Northwest (hereinafter "Contel") seeking service from Contel. On September 26, 1991, however, Marcott and GTE-Northwest (the successor in interest to Contel) filed a joint motion for dismissal of the complaint stating that the underlying matter of the complaint is no longer in dispute and that the parties agree that the complaint should be dismissed.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Marcott's and GTE-Northwest's Joint Motion to Dismiss IS GRANTED and that the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 4, 1991

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for responding to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. All responses to individuals are published in the FCC Record.

These decisions are available for public inspection. Each month, the Managing Director releases a Public Notice listing the decisions he has made on these matters. The decisions are placed in General Docket 86-285. A copy of the decision is also placed in the appropriate docket, if one exits.

The following Managing Director decisions are released for information:

Midcontinent Television of South Dakota, Inc. - Request for Refund of Filing Fee for Low Power Television Translator - **Granted** (September 27, 1991).

Bay Broadcasting Corporation - Request for Waiver of Fees for stations WATW-AM and WJJH-FM, Ashland, Wisconsin - **Granted** (September 27, 1991).

Iowa Communications - Request for Refund of Filing Fee for a new FM station at Rock Valley, Iowa - **Denied** (September 27, 1991).

B and H Broadcasting - Request for Refund of Filing Fee for new FM station at Gould, Arkansas - **Denied** (September 24, 1991).

Sun City Communications, Inc . - Request for Refund of Hearing Fee for a new FM station at Sun City, California - **Granted** (September 24, 1991).

Jack R. Mays - Request for Refund of Filing Fee for a station WOKF(FM), Folkston, Georgia - **Denied** (September 14, 1991).

Breckinridge Broadcasting Company, Inc. - Request for Refund of Hearing Fee for a new FM radio station at Hardinsburg, Kentucky - **Granted** (September 17, 1991).

FM Data Broadcasting, Inc. - Request for Refund of Hearing Fee for a new FM radio station at Temecula, California - **Granted** (September 17, 1991).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE E. PRIDE, CHIEF, FEE SECTION ON 632-0241.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

JEAN-PIERRE SCIOVILLE,
Complainant,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Defendant.

File No. E-91-041

ORDER

Adopted: September 30, 1991; Released: October 4, 1991

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On January 17, 1991, Jean-Pierre Scioville (hereinafter "Scioville") filed the above-captioned formal complaint against American Telephone and Telegraph Company (hereinafter "AT&T") seeking, among other things, damages for AT&T's alleged violations of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). On September 27, 1991, however, Scioville filed a motion to dismiss the complaint with prejudice stating that the parties have negotiated an agreement to settle the matter and that Scioville no longer wishes to prosecute the complaint.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that Scioville's Motion to Dismiss IS GRANTED and that the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-11

In the Matter of

AT&T COMMUNICATIONS Transmittal No. 1854

Tariff F.C.C. No. 15

Competitive Pricing Plan No. 2
Resort Condominiums International

MEMORANDUM OPINION AND ORDER

Adopted: August 1, 1991; Released: September 16, 1991

By the Commission:

I. INTRODUCTION

1. By Transmittal No. 1854, filed on October 23, 1989, AT&T Communications (AT&T) introduced its second Tariff 15 Competitive Pricing Plan (CPP2).[1] The Commission suspended Transmittal No. 1854 for the full five month statutory period and initiated an investigation.[2] The transmittal became effective upon expiration of the statutory suspension period on June 21, 1990, subject to the outcome of the Commission's investigation. For the reasons discussed below, we reject CPP2 as unreasonably discriminatory in violation of Section 202(a) of the Communications Act, 47 U.S.C. Section 202(a).

II. BACKGROUND

2. AT&T established Tariff 15 for the filing of customer specific discounts from the rates in AT&T's general tariffs. Each CPP offers one or more of AT&T's tariffed telecommunications services to a single named customer at reduced rates which AT&T claims are nonetheless set at levels that equal or exceed the rates offered to that specific customer by a competitor.

3. The named customer for CPP2 is Resort Condominiums International, Inc. (RCI). RCI offers timeshare exchange and other travel services to over one million individual members and 1500 affiliated resorts. In September of 1989, RCI solicited bids from several interexchange carriers for provision of that company's telecommunications services. At that time, AT&T was the principal provider of telecommunications services to RCI. In response to RCI's solicitation, MCI proposed a 10 percent monthly discount on its virtual private network (VNET) services and an 8 percent discount on its inbound 800-DAL services, provided that RCI agreed to a monthly revenue commitment of $250,000. RCI could obtain additional discounts of 1 percent on VNET and 2 percent on 800-DAL if its monthly usage exceeded $500,000 or $1 million, respectively. MCI's proposal also included penalties if RCI did not meet its revenue commitments.

4. According to AT&T, RCI informed AT&T that RCI would accept MCI's offer unless AT&T could provide a more competitive bid than the one AT&T had submitted. Accordingly, AT&T designed CPP2 for RCI and filed Transmittal 1854 to implement that single customer arrangement. CPP2 purports to mirror MCI's bid. It provides discounts of 10 percent on AT&T's Software Defined Network (SDN) service and 8 percent on Network Remote Access (NRA)[3] if the customer generates monthly revenues of $250,000.

5. In addition to these discounts for RCI, Transmittal 1854 also revises the general regulations of Tariff 15 to include a new Section 2.1.5.3. which specifies that:

> CPPs are designed to respond to special discounts offered to specific Customers by competing interexchange carriers and, as such, are available to those specific Customers. The CPPs will also be made available to any other Customers demonstrating that they have received substantially similar offers from the competing interexchange carrier.

6. AT&T argues that the above provision makes the RCI plan generally available to similarily situated customers and that any discrimination which results from this limitation on availability is justified by competitive necessity,[4] *i.e.*, the actions of AT&T's competitor force AT&T to deviate from AT&T's generally available tariff rates in order to obtain an eligible customer's business.

7. The Common Carrier Bureau's (Bureau) initial review of Transmittal 1854 indicated that this offering raised significant issues of lawfulness in light of the Communication Act's (Act) prohibition against unreasonable discrimination. Consequently, the Bureau suspended the transmittal for the full five month period that the Act allows and designated several sub-issues for investigation.[5] AT&T and MCI Telecommunications Inc. (MCI) were made parties to this investigation. US Sprint, the National Telecommunications Network, the National Telephone Cooperative Association and the Competitive Telecommunications Association submitted comments in opposition to AT&T's filing.[6]

8. The primary issue for investigation designated in the *RCI Designation Order* was whether AT&T's offering creates unreasonable discrimination in the rates charged to AT&T customers for like communication services in violation of Section 202(a) of the Communications Act.[7] MCI contends AT&T cannot lawfully offer one customer services at prices that differ from those offered to an identically situated customer.[8] Opponents of Tariff 15 expressed concerns about the impact that Section 2.1.5.3. had on the discrimination at work in CPP2. AT&T argues, however, that if the Commission were to determine that an offer were discriminatory solely because it was limited to a single customer, such a finding would amount to a "per se" rule against such discrimination and the statute only proscribes "unreasonable discrimination."[9] Moreover, AT&T contends that its discrimination is reasonable because it is justified by competitive necessity.

9. The parties and opponents of Tariff 15 engaged in a considerable debate as to whether CPP2 complies with the competitive necessity test described in the *Private Line Guidelines*.[10] Overall, opponents argue that this test cannot be appropriately applied to this single customer deal and, even if it could be applied to CPP2, AT&T fails to satisfy the criteria of that test. Debate centers on whether AT&T's offer meets or beats MCI's;[11] whether the lack of general availability of CPP2 is unduly discriminatory;[12] and whether AT&T can properly contend that this offer benefits all users because CPP2, according to AT&T, produces net revenues.[13]

10. Opponents of Tariff 15 also dispute AT&T's contention that CPP2 is generally available to all similarly situated customers because Section 2.1.5.3 makes CPP2, or any subsequent CPP, available to those customers "demonstrating that they have received substantially similar offers from a competing interexchange carrier." CompTel characterizes Section 2.1.5.3. as "meaningless" and "disingenuous."[14] MCI argues that CPP2 is not generally available but merely "conditionally" available dependent upon special circumstances, including the existence of a competitor's offer and AT&T's sole discretion as to whether that offer is substantially similar to the CPP.[15]

11. Opponents of Tariff 15 also contend that the impact of Tariff 15 offerings on competition in the interexchange market must be considered in determining the lawfulness of this offering. Opponents argue that such offerings could adversely affect competition.[16] MCI argues that AT&T's limiting of its competitive response to a customer who has received a competing offer will not serve the competitive development of the interexchange telecommunciations market because AT&T can "target-shoot," rather than institute general price reductions.[17] AT&T argues that its competitive responses in the form of customer-specific pricing is necessary to restore "competitive balance."[18]

III. DISCUSSION

12. The central question in this proceeding is the reasonableness of a discriminatory pricing mechanism under which AT&T offers a discount that is available only to a limited group of customers; the discount is triggered when, and only when, an AT&T competitor approaches a particular customer with an offer that deviates from that competitor's general rates and AT&T then implements an announced policy of meeting but not beating that offer. Tariff 15 was designed to create such a mechanism and the RCI offer was merely a particular application of that mechanism.

13. We conclude that AT&T's use today of such a pricing mechanism in the interexchange market does result in unreasonable discrimination for purposes of Section 202(a) of the Act.

14. As we discuss in the following paragraphs, the effect of offering a discounted rate that is available only when (1) a competitor attempts to "underbid" with a similar offer the general rate otherwise applicable to a particular customer; (2) the customer discloses the terms of the competitor's offer to AT&T; and 3) AT&T's uniform response is to meet but not beat its competitor's price, is to undermine price competition in the interstate, interexchange communications services market. Thus, the discriminatory limitation on the availability of CPP2 affects adversely not only those customers who would be denied service under the terms of the offering but, by virtue of its potential anticompetitive effects, would affect adversely the long-term interests of even those customers who qualify for the discount.

15. The Communications Act does not prohibit any discrimination in the offering of "like" services; the Act by its terms proscribes only *unreasonable* discrimination. *See* 47 U.S.C. § 202(a). This Commission employs a three-step analysis to determine whether a carrier has engaged in unreasonable discrimination.[19] This Commission must determine first, whether the services are "like;" second, if the services are like, whether there is a discriminatory price difference; and third, if there is a difference, whether it is reasonable.[20] As all parties agree, no "likeness" issue arises here. CPP2 purports to offer AT&T's SDN service as described in AT&T's SDN tariff. Nor is there any dispute regarding the existence of a discriminatory price difference between the rates in CPP2 and the SDN tariff. Thus, the remaining issue before the Commission is whether the price difference is reasonable.[21]

16. AT&T argues that competitive necessity justifies the discrimination in this offering. We need not reach that argument, however, because we conclude that a tariff containing a discriminatory provision which operates to discourage competitive pricing behavior or to facilitate anticompetitive behavior is unreasonable even if the provision might be consistent with the particular formulation of the competitive necessity defense described in *Private Line Guidelines*. Competition does not justify an anticompetitive response.

17. As a result of our review and analysis of the interstate, interexchange marketplace in CC Docket No. 90-132, we have concluded that most interstate business services are subject to substantial competition. AT&T, once the sole provider of long-distance services, now faces effective rivalry for these services. Because of the competitive environment in which AT&T and its competitors currently operate, we are implementing today in CC Docket 90-132 a number of regulatory reforms which will enable all telecommunications users to enjoy more fully the benefits of competition.

18. At the same time, we recognize the role that this Commission can play in preserving the competitive structures already in place and eliminating any barriers to the continued development of competition. We can ensure that competitors in that market do not respond to competitive pressure in ways that may undermine or discourage either procompetitive behavior by other carriers or the competitive procurement of services by users.

19. A pricing mechanism such as that established by Transmittal 1854 can have an anticompetitive impact on the interstate, interexchange market. First, the transmittal publicly declares to AT&T's customers and competitors that AT&T will match offers by its competitors to particular customers when those offers discount the otherwise applicable rate for the service at issue. By announcing this policy in advance, the effect of this transmittal is to ensure that all market participants have a shared understanding of both the higher prices the carriers can charge to avoid triggering a rate reduction by AT&T and the consequences of pricing below those rates.

20. In addition, the transmittal requires customers to inform AT&T of a competing offer in order to receive AT&T's discounted rate. This requirement ensures that AT&T receives detailed information regarding a competi-

tor's offer and creates an incentive for customers to communicate those details quickly, thereby minimizing any lag between the competitor's offer and AT&T's detection of that offer.

21. The transmittal also signals competitors that AT&T may not reduce its rates on its own initiative or in response to customer pressure and may instead only respond to reductions for particular customers initiated by competitors. It further limits such response to matching AT&T's competitor's price cut, rather than engaging in unrestricted competitive bidding from which customers are the beneficiaries. Therefore, the transmittal creates an incentive for other interexchange carriers to maintain their existing generally tariffed rate levels, even if, for example, the relationship between those rates and the relevant economic costs underlying the rates may change in ways that would produce rate reductions in a fully competitive market.

22. This transmittal produces precisely the kinds of information flow and marketplace incentives which retard rather than promote competitive pricing. The record does not, of course, establish that AT&T adopted this pricing mechanism for the purpose of limiting competition or that it has had such an effect. Nor are findings with respect to intent and effects required to assess the reasonableness of the discrimination for purposes of Section 202(a). We conclude, however, that the practices embodied in Transmittal 1854 have serious potential anticompetitive consequences and thus must be viewed as unreasonable discrimination.

IV. CONCLUSION

23. ACCORDINGLY, IT IS ORDERED that Transmittal 1854 IS UNLAWFUL under Section 202(a) of the Communications Act. AT&T Communications is directed to file tariff revisions removing Transmittal 1854 and all subsequent amendments in conformance with this Opinion and Order no later than 30 days from the date of release of this Order, upon 60 days' notice.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] In 1988, the Commission rejected the first such plan which had been proposed by AT&T for the Holiday Corporation, AT&T Communications, CC Docket No. 88-471, Memorandum Opinion and Order, 4 FCC Rcd 7933 (1989).

[2] AT&T Communications, Inc., CC Docket No. 90-11, 5 FCC Rcd 2171 (Com. Car. Bur. 1990) (*RCI Suspension Order*).

[3] NRA allows calls to be made from locations that are not on the customer's SDN network to on-network locations.

[4] AT&T cites the Commission's *Private Line Guidelines* which describe the showing that a carrier can make to justify an otherwise discriminatory volume discount on the grounds of competitive necessity. *See Private Line Rate Structure and Volume Discount Practices*, CC Docket No. 79-246, 97 FCC 2d 923, 948 (1984). The *Guidelines* require a carrier relying on competitive necessity to demonstrate, in essence, that the customers of the discounted offering have a competitive alternative to choose from; the discounted offering responds to competition without "undue" discrimination; and the discount contributes to reasonable rates and efficient services for all users.

[5] *RCI Suspension Order* at 2174.

[6] Direct Cases were filed on February 20, 1990 -- Direct Case of American Telephone and Telegraph Company (AT&T Direct Case), Direct Case of MCI Telecommunications Corporation (MCI Direct Case). Oppositions were filed on March 22, 1990 -- Opposition of US Sprint to Direct Case of AT&T (US Sprint Opposition); Opposition of The National Telecommunications Network to The Direct Case of AT&T, (NTN Opposition); The National Telephone Cooperative Association Opposition to Direct Case (NTCA Opposition), AT&T's Opposition to Direct Case of MCI (AT&T Opposition), MCI Opposition to Direct Case (MCI Opposition). The Commission grants CompTel's Motion for Late Acceptance of its Comments filed on Mar. 23, 1990; Competitive Telecommunications Association Comments on Direct Cases, filed Mar. 23, 1990 (CompTel Comments). The parties filed rebuttals on April 6, 1990 -- MCI Rebuttal, AT&T Rebuttal to Opposition. Additionally, the following pleadings were also filed -- US Sprint Reply to AT&T Rebuttal, filed April 23, 1990; Response of American Telephone and Telegraph Company, filed April 23, 1990; MCI Surrebuttal, filed April 23, 1990, MCI Letter to Firestone, May 11, 1990, US Sprint Ex Parte Letter to Firestone, April 18, 1991.

[7] *RCI Designation Order*, 5 FCC Rcd at 2174.

[8] *See* MCI Direct Case at 19, 22, 29 and notes 44, 46 and 61. *See also* CompTel Comments at 2.

[9] AT&T Direct Case at 12, AT&T Rebuttal at 3.

[10] Note 4, *supra*.

[11] *See* AT&T Direct Case at 28; MCI Direct Case at 26, n.53; MCI Rebuttal at 17; MCI Surrebuttal at 2; MCI Letter to Firestone, dated May 11, 1990; US Sprint Opposition at 39, 41.

[12] *See* AT&T Direct Case at 29; US Sprint Opposition at 42-43; MCI Opposition at 14.

[13] *See* AT&T Direct Case at 30-36; MCI Rebuttal at 20; MCI Direct Case at 32-35; US Sprint Opposition at 43-45.

[14] CompTel Comments at 9-10.

[15] MCI Direct Case at 30.

[16] *See* Comptel Comments at 8-9; NTN Comments at 2-3; NTCA Opposition at 3; MCI Rebuttal at i; US Sprint Opposition at 42-43.

[17] MCI Opposition at 12.

[18] AT&T Response to MCI Rebuttal at 16-17.

[19] *See, e.g., MCI Telecommunications Corp. v. F.C.C.*, 842 F.2d 1296, 1303 (D.C. Cir. 1980).

[20] *Id. See also MCI v. FCC*, 917 F.2d 30 (D.C.Cir. 1990).

[21] *See American Broadcasting Companies v. F.C.C.*, 663 F.2d 133, 139 (D.C. Cir. 1980). *See also Dresser Industries, Inc. v. I.C.C.*, 714 F.2d 588, 599-602 (5th Cir. 1983); *Western Union Int'l, Inc. v. FCC*, 568 F.2d 1012, 1019 n.15 (2d Cir. 1977), *cert. denied*, 436 U.S. 944 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-487

In re Applications of

GOODLETTSVILLE BROADCASTING COMPANY, INC.	File No. BPH-861215MI
SAR BROADCASTING, INC.	File No. BPH-861216MB
BLEDSOE COMMUNICATIONS, LTD.	File No. BPH-861216MD
HEIDELBERG-STONE BROADCASTING COMPANY	File No. BPH-861217MA
DG ENTERPRISES, INC.	File No. BPH-861217ML
GOODLETTSVILLE COMMUNITY BROADCASTING, INC.	File No. BPH-861217MM
Rudy A. Lindsey, Sr. and Faye B. Lindsey, Husband and Wife, A Tenancy by the Entireties, d/b/a LINDSEY CHRISTIAN BROADCASTING COMPANY	File No. BPH-861217MO
WILLIAM E. BENNS, III	File No. BPH-861217MQ
TENNESSEE WOMEN IN BROADCASTING, INC.	File No. BPH-861217MT
RICHARD S. FRANCIS	File No. BPH-861217NA

For Construction Permit for
New FM Station, Channel 246C2,
Goodlettsville, Tennessee

ORDER

Adopted: September 16, 1991; Released: October 4, 1991

By the Review Board: MARINO (Chairman) and ESBENSEN. Board Member BLUMENTHAL not participating.

1. Ten applicants remain after a comparative hearing to select a broadcaster for a new FM station in Goodlettsville, Tennessee. They were compared in the *Initial Decision* of Administrative Law Judge Chachkin released July 5, 1990, 5 FCC Rcd 3965 (I.D.). Participation of owners in the operation of the proposed station, a substantial factor in the *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395-196 (1965), was decisional in this case. I.D., para. 259. Three of the applicants were held to be quantitatively inferior, I.D., paras. 247-252; and three others qualitatively inferior. I.D., para. 254. The remaining four applicants were compared on all the traditional enhancement factors, and DG Enterprises, Inc., was awarded a slight qualitative preference. I.D., paras. 255-259.

2. Exceptions were filed by all ten applicants, and oral argument was held on November 30, 1990. Thereafter, the case was held in abeyance on the Board Chairman's initiative to avoid a possible hasty remand while the parties attempted to settle the case by January 1, 1991, and later pending review of *Northampton Media Associates v. F.C.C.*, No. 90-1291 (D.C. Cir. July 12, 1991). In the view of the Board Chairman, the record fully supports the ALJ's selection of DG Enterprises as the comparatively superior applicant. Board Member Esbensen, however, believes the proceeding must be remanded for further inquiry into DG's financial qualifications. Because of the divergence of views, and the consequent absence of two votes for any result, the proceeding must necessarily be certified to the Commission for a final decision. *See* 47 CFR §0.361(c). For the benefit of the Commission and the parties, there follows the separate opinions of the Board Chairman and Board Member Esbensen (dissenting).

Joseph A. Marino
Chairman, Review Board
Federal Communications Commission

PROPOSED DECISION

Board Chairman MARINO:

Appearances

Harry C. Martin, *Troy F. Tanner* and *Matthew H. McCormick*, on behalf of Goodlettsville Broadcasting Company, Inc.; *Stanley G. Emert, Jr.*, on behalf of Sar Broadcasting, Inc.; *C. Michael Norton*, on behalf of Bledsoe Communications, Ltd.; *Timothy K. Brady*, on behalf of Heidelberg-Stone Broadcasting Company; *Harry F. Cole* and *Howard W. Simcox, Jr.*, on behalf of D.G. Enterprises, Inc.; *Leonard S. Joyce* and *Shaun A. Maher*, on behalf of Goodlettsville Community Broadcasting, Inc.; *Jerrold Miller* and *John S. Neely*, on behalf of Rudy A. Lindsey, Sr. and Faye B. Lindsey, Husband and Wife, A Tenancy by the Entireties, d/b/a Lindsey Christian Broadcasting Company; *Lauren A. Colby*, on behalf of William E. Benns, III; *Samuel D. Lipshie*, on behalf of Tennessee Women In Broadcasting, Inc.; *Jeffrey D. Southmayd*, on behalf of Richard S. Francis.

I

3. *QUANTITATIVE FACTORS*: In its *Comparative Policy Statement*, *supra*, the Commission declared that "integration," participation of ownership in the management of the proposed station, was a factor of substantial importance. "It is inherently desirable that legal responsibility and [full time integration in] day-to-day performance be closely associated." 1 FCC 2d at 395. Subsequent cases have established that where a sufficient quantitative integration ownership difference exists between applicants, the Commission looks only to the quantitative difference in selecting the superior comparative applicant. *See Miracle Strip Communications, Inc.*, 4 FCC 5064, 5066 (1989)(subsequent history omitted). A difference of 12.5% in ownership integration (1250 using the appropriate Commission index) is deemed a decisional quantitative difference. *Miracle Strip*, 4 FCC Rcd at 5066.

4. Here, three applicants "received significantly less than 100% quantitative credit," I.D., 259, and thus were found to be quantitatively inferior by more than the 12.5% decisional integration difference: SAR Broadcasting Inc. (SAR), 66 1/3% full time integration credit; I.D., paras. 247, 249; Bledsoe Communications Limited (BCL) 75% credit, *id.*, at para. 251; and Tennessee Women In Broadcasting Inc. (TWIB), at most 22 1/2%. *Id.*, at para. 252. We first consider the exceptions of the three applicants which claim 100% quantitative credit.

5. *SAR*: "It is well-settled that, if, at the time an integration credit pledge is made to the Commission, an extrinsic contingency could vitiate that pledge, credit will not be awarded." *Charisma Broadcasting Corp.*, 6 FCC Rcd 3411 (Rev. Bd. 1991), at para. 10; *see also* cases cited by ALJ, I.D., para. 247. On December 16, 1988, the date the ALJ called for integration proposals, the integration pledge of Allen Williams, a 33 1/3% SAR stockholder, was contingent on the denial of a pending application where Williams proposed full-time integration. I.D., para. 48-49. That contingency was not removed until March 24, 1989, when the Commission denied Williams' application in *Newton Television Limited*, 4 FCC Rcd 2561, 2562 (1989). Accordingly, in the instant case, the ALJ followed the well-established practice in comparative cases and reduced SAR's integration credit by 33 1/3% because of Williams' contingent pledge. I.D., para. 247.

6. SAR initially argues that the contingency was removed on March 24, 1989, prior to the exhibit exchange date in this case; and since Williams' pledge was no longer contingent, it should have been fully credited after that date. We affirm the ALJ's conclusion (I.D. para. 248) that the crucial date in this case was December 16, 1988, when all the applicants had to finalize their integration proposals by filing integration statements containing their pledges. *See Northland Communications*, 100 FCC 2d 914, 917 (Rev. Bd. 1985) (contingency must be removed by the date specified by ALJ for integration statements and pledges)(subsequent history omitted). After that date, an applicant could not upgrade or improve its comparative showing. As the ALJ correctly concluded, relying upon *High Sierra Broadcasting, Inc.*, 96 FCC 2d 423, 431 (Rev. Bd. 1983)(subsequent history omitted), an applicant cannot, after the relevant cut-off date, "change and improve its comparative proposal to the detriment of the competing applicants and seek credit for [an individual] merely because subsequent events make it possible for him to work full-time at the station." *See* cases cited in *Charisma Broadcasting*, *supra*.

7. SAR further argues that Williams' appeal in *Newton* was predicated on a claim that the other applicants there violated the power limitations set forth by an agreement between the United States and Canada, and that he was not informed by the Commission until March 24, 1989 that the Canadian government had three years earlier consented to the use of higher power. SAR now argues that Williams was deprived of procedural due process because "[i]t is totally unfair to charge Williams with knowledge of a fact that only the Commission and the Canadian government ever knew." (SAR Br. at 2-3).

8. The factual record does not support SAR's procedural argument. As one of its competitors points out, Williams' appeal in the *Newton* case was based upon a reaffirmation of his pledge to move to the community of license to be integrated full time in that proposal, and that "his extensive broadcast experience in both television and radio would be enhancing factors, which coupled with his pledge to move to Newton, New Jersey, and his minority status, would make his application the clear winner." *See* GBC Reply, at 17. In *Newton*, the Commission fully credited Williams' proposal, but found that his application was not otherwise comparatively superior. Thus, the Canadian letter was not decisional. However, the record does firmly support the ALJ's conclusion that Williams' pledge in Goodlettsville was contingent upon the *Newton* case and that SAR is not entitled to credit. I.D., para. 247.

9. *BCL*: Two of BCL's limited partners, C. Michael Norton and Charles W. Boone, together hold 25% interest. They are both attorneys and "have performed legal services for BCL--including initiating the application, representing BCL through the hearing process, all without billing BCL." I.D., at paras. 251, 68-73. Consequently, the ALJ held that they could not be considered passive principals, *id.* 251. He thereupon reduced BCL's credit by 25% because "attorneys who hold equity interests in an applicant and who simultaneously perform legal services for that applicant cannot be considered mere passive investors," quoting *Religious Broadcasting Networks*, 3 FCC Rcd 4085, 4093, and 4105 n. 27 (Rev. Bd. 1988). *Id.*

10. BCL argues that the ALJ retroactively applied the insulation standards set out in *Clarification of Ownership Attribution*, 1 FCC Rcd 802 (1986), which were not applied to comparative cases until *Mark L. Woodlinger*, 3 FCC Rcd 3139 (Rev. Bd. 1988). BCL's argument misses the mark, because, as the Commission recently repeated, the basic insulation requirement was first set out in 1981, in *Anax Broadcasting*, 87 FCC 2d 483 (1981), before the BCL partnership agreement was entered into. *See Doylan Forney*, 5 FCC Rcd 5423, at para. 4 (19 90), where the Commission indicated that it had held:

> In *Anax* that the interests of limited partners are not relevant to integration credit if the limited partners are merely passive investors without power to control the applicant. *Id.* at 488. Conversely, the interests of nominally "limited" partners who, in fact, are not mere passive investors must be factored into the integration analysis. The analysis in *Attribution* and the later reconsideration of that report are consistent with the *Anax* standard. *See Magdalene Gunden*, 3 FCC 2d 7186, 7186 ¶ 6 (1988), *recon. denied*, 5 FCC Rcd 2509 (1990). Nothing that the

> Commission said in *Attribution* has changed the basic principle of *Anax*: only purely passive interests are exempt from attribution in comparative cases.

Moreover, on July 5, 1988, the Board released its decision in the *Religious Broadcasting* case, holding that an attorney cannot be considered a passive investor in a broadcast application when he represents that applicant in the comparative hearing. Here, after receiving specific notice in *Religious Broadcasting*, BCL's attorney-principals continued to represent the applicant. I.D., paras. 70-73, 251. We therefore affirm the ALJ's decision to diminish BCL's integration credit by 25%.

11. *TWIB*: The voting stock of this corporation is held by Jayne Ann Woods (45%), Syble Norman (45%), and B. Billye Sanders (10%). I.D., para. 162. TWIB's ownership was intertwined with SunGroup, Inc. (SunGroup), which controls many broadcast licenses. *Id.*, at 165-172. Woods and her husband hold a significant interest in Sun Group. *Id.*, at 220. Based on detailed findings, the ALJ held that TWIB's integration proposal could not be credited because "it was just another extension of Sun Group's involvement in the broadcast industry." *Id.*, at 252. The ALJ reasoned that:

> . . . Woods and her husband have been involved in SunGroup for a long period of time and their actions have become so intertwined with SunGroup's that it is impossible to separate the two. They share the same office space, secretaries, attorneys and engineers. Although SunGroup does not have a direct interest in TWIB's application, the extensive role that Woods and her husband, as SunGroup principals, have played in the prosecution of TWIB's application necessitates the finding that the Wood's together will control TWIB. This conclusion is buttressed by the lack of participation by Norman and Sanders in the prosecution of TWIB's application and their total reliance on the Woods. It is reasonable to assume that the Woods' domination would continue if TWIB received the permit. In sum, neither Norman or Sanders have adequately demonstrated that their integration proposals are plausible or will be effectuated. Therefore, TWIB can receive at the most only 22 1/2% (1/2 of Jayne Ann Wood's 45% interest) integration credit for her proposed participation. *See Richard P. Bott, II*, 4 FCC Rcd 4924, 4929 (Rev. Bd. 1989); *Capital City Community Interests, Inc.*, 2 FCC Rcd 1984, 1989-1990 (Rev. Bd. 1987).

Id.

12. TWIB suggests in its exceptions that the ALJ's finding that "TWIB and SunGroup are intertwined" and his conclusion that its "integration proposals were not plausible," are clearly erroneous. TWIB Br. at 2-5. However, TWIB fails to challenge the record support for the ALJ's basic findings of fact. Those unchallenged findings, we conclude, fully support the ALJ's decision, and establish that here, as in the recent Commission decisions in *Royce International Broadcasting*, 6 FCC Rcd 2601 (1991) and *Poughkeepsie Broadcast Limited*, 6 FCC Rcd 2497 (1991), TWIB's ownership and control is fatally uncertain because its two alleged active principals, Norman and Sanders, have exercised little, if any, significant control over the applicant, and have not shown any real prospect of being active or in control. In essence, the following undisputable findings support the ALJ's conclusions, which we affirm:

> a. Woods and her husband, who is the chief executive officer of SunGroup, organized the TWIB application at Wood's office which are shared with SunGroup. I.D., paras. 165-167.
>
> b. Woods and her husband recruited Norman and Sanders, utilized SunGroup's engineer, attorney, and secretarial staff in preparing TWIB's application. *Id.*, at 168-170.
>
> c. The Woods obtained TWIB's financial commitment letter from a Bank in which Mr. Woods has a 49% interest. *Id.*, at 171.
>
> d. Norman, TWIB's alleged business manager, did not know about the corporation's checking account, which had been established by Woods who had written all the checks; Norman played no role in TWIB other than providing limited finances, and he relied on Woods to handle everything. *Id.*, at para. 189.
>
> e. Sanders joined TWIB for a nominal $100; she has had no involvement in the application process, in the selection of the engineer, the attorney, the transmitter site, or in the obtaining of finances; her only role was in helping to prepare the EEO program. *Id.*, at 204-205.

II

13. *QUALITATIVE ENHANCEMENT FACTORS*: Seven remaining applicants received 100% integration credit, I.D., para. 247, and were compared on the traditional qualitative factors: (a) local residence and civic participation, (b) minority ownership, (c) female ownership, and (d) past broadcast experience. *Miracle Strip supra*, 4 FCC Rcd at 5065. Local residence and minority ownership factors are deemed of equal weight, *Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945 (1985), but female ownership has less significance than either minority ownership or local residence. *Id.*, 100 FCC 2d at 945, 947-948. Past broadcast experience is deemed of minor significance, *Policy Statement*, 1 FCC 2d at 396 and accorded less weight than female ownership credit. *Swan Broadcasting Limited*, 6 FCC Rcd 17, 21 (Rev. Bd. 1991). Civic participation is considered as part of an applicant's local residence. *See Ronald Sorenson*, 6 FCC Rcd 1952 (1991). Broadcast experience, in turn, encompasses cable experience to the extent the cable programming is responsibe to local needs. *Id.*

14. *Inferior Applicants*: Based upon very complete findings, the ALJ concluded that, of the seven applicants receiving 100% integration credit, three were qualitatively inferior: William E. Benns, III (Benns); Richard S. Francis (Francis), and Goodlettsville Community Broadcasting, Inc. (GCBI). *I.D.*, para. 259. In essence, Benns was weakest because he has no present local residence/civic activities, and is not entitled to minority or female ownership credit. Francis, was also weak because his only enhancement credit was service area residence without any record of past civic activities. *Id.*, at 231. GCBI was deemed deficient because, aside from broadcast experience (which is of minor significance), its only enhancement

credit consisted of area residence since August of 1988 and a proposal to move to Goodlettsville in the event of grant. *Id.*, at 254. No significant exceptions have been taken to the ALJ's conclusions about the qualitative inferiority of the three applicants, and his conclusions are fully supported when compared with the qualitative attributes of four remaining applications.

15. *Superior Applicants*: The four remaining applicants are: DG Enterprises, Inc. (DG); Goodlettsville Broadcasting Company, (GBC); Heidleberg-Stone Broadcasting Company (HSBC); and Lindsey Christian Broadcasting Company (LCB).

16. As noted above, para. 1, *supra*, the ALJ awarded DG a slight, but dispositive, integration preference over the three superior applicants. DG's enhancements included: (1) 100% long-term service area residence for its two integrated stockholders, Dena Groden (75%) and Karen Browne (25%), augmented by Groden's 75% service area civic participation and both principal's proposals to move to Goodlettsville in the event their application is granted; (2) 25% minority ownership for Browne; (3) 100% female; and (4) 25% broadcast experience (for Browne). GBC would discount Browne's broadcast experience since its pertained to cable, but that argument is of no avail in light of *Sorenson*. *See* para. 13, *supra*. We, like the ALJ, will compare the qualitative enhancements of each of the remaining three applicants against DG.

17. *GBC*. GBC was credited with: (1) 100% long-term service area residence, augmented by the current Goodlettsville residence (since 1985) of 20% shareholder Eleanor Mead and past residence (1968-1977) of 20% shareholder Dorothy L. Sheppard, as well as 100% civic participation; (2) 80% female ownership (four of the 20% shareholders); and (3) 20% broadcast experience. GBC contends that it should be preferred over DG, arguing that the ALJ erred in equating Groden's and Browne's proposed move to Goodlettsville to that of Mead's local residence and Sheppard's past Goodlettsville residence, and in awarding DG civic participation credit. We will not disturb the ALJ's relative comparative ranking of the the two applicants, even assuming, *arguendo*, that GBC is entitled to all the enhancements accorded by the ALJ, findings that are contested by GBC's opponents. First, we see no basis for denying Groden credit for civic participation, though they were of minor weight, *see I.D.*, para. 113. And, second, although GBC is correct that a proposal to move to the community of license does not generally offset an actual local residence advantage, *see Policy Statement*, 1 FCC 2d at 396, DG here, will have 100% of its principals living in Goodlettsville (should it prevail), whereas only 20% of GBC's principals will reside there. Both applicants have long-term residence in the service area, approximately the same quality of civic participation, and only a small quantitative civic disparity, *i.e.*, 100% for GBC versus 75% for DG. Admittedly, the comparison between the two applicants is very close, but DG does have (1) a minority ownership advantage of 25%, which is more than enough to outweigh Mead's 20% current local residence (she moved to Goodlettsville only the year before GBC filed its application) and relatively brief pre-filing local civic activities; and (2) a 20% female ownership advantage. Both applicant's local residence is slightly enhanced by civic activities, but because of DG's minority and female ownership advantages, DG has a close but obvious edge. The broadcast experience of both applicants is comparable (quantitatively 25% for DG versus 20% for GBC and qualitatively similar).

18. *HSBC*. HSBC received: (1) 51% minority ownership credit for the participation of John Heidelberg, who is black; (2) 51% long-term service area residence for Heidelberg, plus his current residence in Goodlettsville (he rented an apartment there after the filing of his application), and 49% short-term service area residence for Katherine Stone (she moved into the service area the year before filing the application), augmented by some civic participation by both principals; (3) and 51% broadcast experience for Heidelberg. HSBC contends that it should prevail comparatively over DG, but part of its argument is based on the contention that DG is entitled to no broadcast experience, a contention rejected above. *See* para. 16. Moreover, HSBC argues that it has an advantage on local residence because of Heidleberg's current and future Goodlettsville residence. That residence is entitled to no more weight than DG's proposal to move to Goodlettsville because Heidleberg's residence commenced after the filing of the HSBC application, and it only involves a 51% principal, whereas DG's proposed move includes 100% of its principals. DG's 100% long-term service area residence, qualitatively enhanced by 75% civic participation, merits an overall local residence enhancement over HSBC's 51% long-term service area residence with civic participation, and 49% short-term area residence. All of Stone's pre-filing civic activities appear to relate to performances as a singer at various functions, and it has not been established on the record that she had any FCC-recognized pre-filing civic activities. *Newton*, 3 FCC Rcd at 560 n. 15. Weighing the comparative attributes, DG has advantages on long-term local residence (100% versus 51%), and female ownership (100% versus 49%). HSBC has a 26% advantage on minority ownership (51% versus 25%), which is of less relative weight than the 49% advantage DG possesses on long-term service area residence; and he has a 26% advantage on broadcast experience, which, too, is of less weight than the 31% advantage DG has on female ownership. Thus, DG is comparatively superior.

19. *LCB*. LCB is a tenancy by the entireties consisting of Faye Lindsey and Rudy Lindsey, husband and wife. LCB received (1) 100% long-term service area local residence, augmented by past residency in Goodlettsville (1971-1979) for both Lindseys, as well as civic participation of both principals; (2) 50% female ownership; and (3) 50% broadcast experience. LCB claimed that the ALJ erred in rejecting its request to explore its purported sensitivity to minorities and females, presumably in an effort to offset the advantages claimed by its competitors for minority ownership. It concedes that it filed a request for a sensitivity issue after the exchange of the Integration and Diversification Statement, but argues it was not on notice until after the filing of the integration statements that any of the other applicants would claim minority enhancement. That explanation is rejected since the applicant could not upgrade its comparative posture after the filing period for freezing comparative positions has expired. *See generally Alexander S. Klein*, 86 FCC 2d 423, 434 (1981). In *Chase Communications Co.*, 100 FCC 2d 689, 693 n. 9 (Rev. Bd. 1985), the Board alerted applicants seeking special minority sensitivity claims to file motions to enlarge issues within 30 days after publication of the hearing designation order in the Federal Register.

LCB did not comply with that requirement and cannot now seek to mitigate its competitor's minority ownership advangages. *See also Colonial Communications, Inc.*, 6 FCC Rcd 2296, 2298 n. 9 (1991). Thus, in the comparison between LCB and DG, both have 100% long-term service area residence, with LCB slightly favored on quantitative civic activities (100% versus 75%), and possessing some past Goodlettsville residence. LCB's otherwise recognized plus factor on local residence is partially offset, however, by the DG proposal to have both of its principals move to Goodlettsville. LCB's principals do not propose to move to the principal community, *I.D.*, para. 258. LCB's broadcast experience, both quantitatively (50% versus 25%) and qualitatively, *see Id.*, at paras. 118, 135, is superior to that of DG. However, DG has a 25% advantage for minority ownership (25% versus 0%) and a 50% advantage for female ownership (100% versus 50%) that far outweigh the broadcast experience advantage (and arguably any local residence plus factor) possessed by LCB.

20. In sum, while the comparative advantage is slight, DG is the superior applicant. GBC is ranked second over both HSBC and LCB on the strength of its 80% female ownership. That is, HSBC's 51% minority ownership and long-term service area residence, coupled with its 49% short-term service area residence (enhanced slightly by civic activities) is, on balance, only very slightly above, or equal to, GBC's 100% long-term service area residence, (enhanced slightly by civic activities). HSBC's minor advantage on broadcast experience (51% versus 20%) makes the case even closer between HSBC and GBC, but is not enough to prevail over GBC's female ownership advantage (80% versus 49%). Similarily, LCB has comparable long-term service area residence and a minor broadcast advantage (50% versus 20%), but lags behind on female ownership (80% versus 50%), which is accorded more weight. *See Swan Broadcasting Limited*, 6 FCC Rcd at 21. LCB also received a very slight diversification demerit placing it behind HSBC.

III

21. *DG's FINANCIAL QUALIFICATIONS*: While the record supports the ALJ's conclusion that DG is the superior comparative applicant, troublesome legal arguments have been raised for the first time on appeal about DG's financial qualifications. (Benns Br., 15-25, GBC Br., 5-11, HSBC Br. 4-17, and SAR Br. 13). In its Reply, at 10-22, DG defends the ALJ's ruling denying a financial issue at the end of the hearing. Tr. 1569-1574. It also argues that "the manner in which this issue has been raised [on appeal] by the various parties falls far short of the Commission's standards." *Id.* 11.

22. Prior to hearing, at a deposition session on March 13, 1989, DG's principal Dena G. Groden admitted that in December of 1986, when she certified that DG was financially qualified, the applicant had no written commitment from any lender. Groden relied upon an oral understanding with J. Dan Gilbert of Heidtke and Associates, an investment brokerage firm in Nashville, Tennessee. Groden met with Gilbert three times, but did not provide him with any financial statements about DG's principals; nor was anything reduced to writing regarding what was said in her meeting with Gilbert. DG did provide the other parties with a written financial commitment letter from Sovran Bank in Nashville before the deposition session, but that letter was dated February 16, 1989, more than two years after the December 1986 certification. GBC, relying on Groden's admission that DG had nothing in writing at the time of certification, and the Review Board's observation in *Las Americas Communications Inc.*, 1 FCC Rcd 786, 788 (Rev. Bd. 1986) that "written documentation is the *sine qua non* for financial qualifications," sought an issue: "To determine whether DG has misrepresented its financial qualifications." *See* GBC Petition to Enlarge, filed April 17, 1989, pp. 1, 2-4.

23. GCBI, relying on essentially the same admissions at deposition, and *Las Americas*, sought an issue to determine whether DG "had falsely certified its financial qualifications." (*See* GCBI Petition to Enlarge Issues filed April 26, 1989, p.p. 5-12) GCBI also sought an issue: "To determine whether DG is financially qualified to receive the construction permit it seeks." This issue was based upon alleged defects in the Sovran Bank letter. *Id.*, 12-18. In essence, GCBI urged that:

> [P]rior to the production of documents in this case and prior to the deposition in this proceeding, DG Enterprises, Inc. retained an attorney to assist it with the upcoming litigation. At that time, DG Enterprises, Inc. approached Doswell P. Brown [Sovran] for a financial commitment letter. As it turned out, DG Enterprises, Inc., through its own testimony, claims that it now relies upon the Sovran Bank letter of February 16, 1989, as reasonable assurance of the availability of funds for construction and operation costs. Clearly, by the specific and explicit wording in that letter, Sovran Bank does not intend to be bound by that February 16, 1989 letter. Therefore, DG Enterprises, Inc. never has been nor is it now financially qualified to construct and operate the proposed new FM facility at Goodlettsville, Tennessee.

Id., 18.

24. In its opposition before the ALJ, DG responded that *Las Americas* did not require enlargement because in *Armando Garcia*, 3 FCC Rcd 1065, (Rev. Bd. 1988), the Board had indicated that an intent to deceive must be shown in order to justify a misrepresentation issue, and that the Board had declined to disqualify "if there was other reasonable and reliable evidence that funds would be available." 3 FCC Rcd at 1067. It submitted Groden's declaration, which established that, prior to certification in 1986, she personally assembled estimates of the costs of construction and operating the station for three months. Groden later testified that she discussed these cost estimates with her consulting engineer, equipment vendors, radio station managers and advertising personnel. Tr. 1171-1177.

25. To obtain a commitment of funds, Groden declared that she met on several occasions with Gilbert, an established investment broker in Nashville. Groden was aware that Gilbert had previously successfully arranged for financing of broadcast related entities. During her meetings with Gilbert, they discussed Groden's cost estimates, as well as background information regarding DG and its two principals. Groden concluded that:

> As a result of our meetings, Mr. Gilbert advised me that sufficient funds would be made available to DG to meet its estimated costs. I understood this to be a

> firm commitment made by Mr. Gilbert as a well-established investment broker. I did not believe that any further formalities relative to that commitment would be necessary at that time.

DG's Opp. filed May 11, 1989, Attachment C.

26. At the time of certification, Groden was prosecuting the application *pro se*. DG retained counsel, however, shortly after the application was designated for hearing. After discussing the matter with counsel, Groden decided to secure alternative finances. Since Groden and Browne had already obtained a loan from Sovran, Groden, after several discussions with Sovran, obtained the commitment letter, copies of which, were provided to all parties prior to the deposition session. *Id.*

27. Groden's declaration was supported by a letter from Gilbert, dated February 15, 1989 and Gilbert's declaration, dated May 11, 1989, which the ALJ ultimately found fully confirmed the existence of a *bona fide* oral commitment prior to certification. (Tr. 1570-71) When DG's principals testified at the hearing on June 7 and 8, 1989, the petitions to enlarge issues were still pending. Several of the parties were permitted to ask questions about DG's finances. (Tr. 1167, 1171-75, 1182-86). Thereafter, on the last day of the hearing (June 15), the ALJ denied the petitions to enlarge issues. (Tr. 1570-72).

28. First, the ALJ found that Groden's explanation about the steps that she had taken before financial certification were "fully back[ed] up" by Gilbert's letter and declaration which together confirm that Gilbert "made a financial commitment to DG Associates. In light of these facts, the [misrepresentation and false certification] issue will not be added." Tr. 1570-71. The ALJ explained that:

> It's well established intent to deceive must be demonstrated in order to support a misrepresentation issue. *Armando Garcia*, 3 FCC Rcd 1065 at 1067, (Rev. Bd. 1989). Here no evidence has been proffered showing intentional deception. Moreover, the opposition, which has not been rebutted, demonstrates a complete absence of deception and shows on the contrary that DG acted in good faith at the time of its financial certification. (Tr. 1571)

Second, the ALJ denied the requested financial qualification issue because:

> . . . the bank letter from Sovran Bank establishes reasonable assurance for the availability of necessary funds . . . in my judgment [the bank letter] fully meets the Commission's requirements concerning the nature of information to be contained in a bank letter. In this connection, contrary to GCBI's assertion, the Commission has never required an applicant to obtain a binding loan agreement . . . . *Multistate Communications, Inc. v. FCC*, 590 F.2d 1117, (D.C. Circuit, 1978). (Tr. 1572).

29. On appeal, GCBI has *not* challenged the ALJ's denial of its false certification and financial qualifications issues. GBC, and three other applicants, Benns, HSBC, and SAR have filed exceptions which present new and differing arguments about why a financial qualifications issue should have been designated against D&G. In essence, appellants have abandoned GCBI's basis for seeking a financial issue, *see* para. 23, above.

30. GBC now argues that there was no substantial or reliable evidence that the investment firm, Heidtke & Associates, ever intended to supply reasonable assurance of financing to DG; nor was there any showing that "Heidtke itself made loans of any sort or had funds available in December of 1986 to lend to DG." Thus, a financial qualification issue should have been designated, as in *Charisma Broadcasting Corp.*, 5 FCC Rcd 2916, 2917 (Rev. Bd. 1990). GBC's Br. pp. 8-9. HSBC agrees that DG's situation is controlled by *Charisma, supra*, because there, as here, "there existed no underwriting guaranteed from the investment firm, no written documents or other evidence establishing the potential lender's ability to fund the loan." HSBC Br., pp. 4-9.

31. Benns, on the other hand, claims that the documents before the ALJ established that, if there was any agreement, it was a personal one between Gilbert and Groden, and that a financial issue should have been designated because "Groden never determined whether Mr. Gilbert had the financial wherewithal to pay the estimated costs of construction." Benn's Br. 18-25. Benns also urges that, as a matter of law, if DG was not financially qualified when it certified, "its subsequent attempt to use the Sovran letter will not help unless it can show that it was qualified originally." *Id.*, 24-25. Finally, GBC, Br. 10-11, and HSBC, Br. pp. 11-17, advance yet another theory that the Sovran Bank letter does not reflect *a bona fide* commitment, but is a classic accommodation letter. They argue that *Shawn Phalen*, 5 FCC Rcd 53 (Rev. Bd. 1990), and numerous other cases, HSBC Br. 14-17, require the designation of a financial issue.

32. We agree with DG that the record (summarized in paras. 21-28, above), establishes that none of these arguments was made before the ALJ, and that appellants "under the guise of exceptions" are attempting to file "grossly late" petitions to enlarge issues, pursuant to 47 CFR 1.229. DG Reply, p. 11-15. Under these circumstances the Commission itself has held that:

> Applicants have a duty to raise any pertinent allegations concerning their opponents' proposal as soon as possible . . . Moreover, where the record in the proceeding has already been closed, . . . petitioners must show that their contentions are based on newly discovered evidence that could not, through the exercise of due diligence, have been discovered earlier.

Omaha TV 15, Inc., 4 FCC Rcd 730, 731 (1989). Since the four competing applicants took no steps at all to bring their contentions to the ALJ's attention, either by way of petitions to reopen, or even in their proposed findings, this matter is governed by the Commission's observation in *Omaha TV*, that:

> The record need not be reopened for evidence easily discovered initially and only deemed crucial "when seen from the highland of hindsight."

Id., 4 FCC Rcd at 731.

33. Significantly, in two recent cases, the Commission followed its *Omaha TV 15* ruling and insisted that "the Board and ALJs should strictly enforce the provisions of Section 1.229." *Great Lakes Broadcasting, Inc.*, 6 FCC Rcd 4331, 4332 (1991); *Texas Communications Limited Partnership*, FCC 91-270, released September 4, 1991 note 8. *Texas Communications* is especially applicable to the new financial arguments because the Commission there noted that: "The record need not be reopened based on known matters that [Appellant] only now deems crucial," citing *Omaha TV*, *supra*, and *Shirley Marchant*, 4 FCC Rcd 5241, 5242 para. 7 (Rev. Bd. 1989). Finally, appellants before us have not even attempted to show that their grossly untimely financial contentions satisfy the stricter showing mandated by *The Edgefield-Saluda Radio Company*, 5 FCC 2d 148, 148-149 (Rev. Bd. 1966); *Great Lakes*, *supra*, para. 9.

34. In sum, in this ten-party comparative case, Commission rules and precedent foreclose the parties from rumaging thorough a fifteen volume docket for some old facts and then fashioning five or six new and conflicting theories on appeal, which were never presented to the presiding ALJ who had earlier carefully considered the arguments of all parties made both prior to and at the hearing, paras. 27-28 above. *See Roxanne Givens*, 6 FCC Rcd 2961 (1991) at n. 2 (Commission admonishing applicant for raising an argument not made earlier before the ALJ or Review Board).

DISSENTING STATEMENT TO "PROPOSED DECISION" BY BOARD MEMBER ERIC T. ESBENSEN

I respectfully submit that the Board should have promptly remanded this proceeding to the Presiding Officer more than one year ago[1] on appropriate financial issue(s) with respect to the purported winner below, DG Enterprises (DG).[2]

The record is uncontroverted (*see* paras. 22-23, *ante*) that when DG affirmatively certified in its application that it had "reasonable assurance" of funds available for construction and operation, a DG principal had done no more than to engage in several "conversations" with an "investment brokerage firm" representative. It had no written commitment of funds available from any institution, and had provided no information (financial or otherwise) about DG to any putative lender. In *Charisma Broadcasting Corporation*, 5 FCC Rcd 2916 (1990), the Board, based upon virtually identical circumstances, remanded that proceeding to determine if an applicant there was financially qualified at the time it certified its application. So it must be here. *See also Marlin Broadcasting of Central Florida, Inc.*, 5 FCC Rcd 5751 (1990); *Aspen FM Inc.*, 5 FCC Rcd 3196 (Rev. Bd. 1990), *review denied*, 6 FCC Rcd 1602 (1991).

The Board Chairman would agree with DG (*see* para. 32, *ante*) that "none of these arguments [concerning DG's financial qualifications] were made before the ALJ . . . ." However, the underlying facts *were* presented in petitions to enlarge issues to the ALJ by at least two competing applicants, and the ALJ merely determined that no substantial and material questions of deliberate misrepresentation had been raised (*see* paras. 22-28, *ante*).

Misrepresentation aside for the moment, *Charisma*, as well as basic policy and well-established precedent, demand a remand here because a *prima facie* showing has been made necessitating an inquiry into the facts and circumstances surrounding DG's affirmative financial certification and whether or not it was financially qualified at the time it filed its application.

FOOTNOTES TO DISSENTING STATEMENT

[1] The Board's decision in this proceeding was due, pursuant to 47 CFR §0.362(b), in January 1991. However, as the Board Chairman notes, he elected in his role as the supervisory member of the panel, at his own "initiative" (*see* para. 2, *ante*), to await the court's decision in the then-pending case of *Northampton Media Associates v. FCC*, No. 90-1291, slip op. (D.C. Cir. 1991). With all due respect, however, I submit that the issues there were completely inapposite to this proceeding.

[2] Because I disagree with the conclusion that DG is financially qualified, and because the Board Chairman's proposed *Decision* is fatally infirm on that ground alone, I express no opinion as to the *Decision's* treatment of the exceptions directed towards the remaining competing applicants.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-500

In the Matter of

Definition of Congested Areas in
the Broadcast Auxiliary Services and
the Cable Television Relay Service.

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 23, 1991 Released: September 23, 1991

By the Commission:

INTRODUCTION

1. The Society of Broadcast Engineers ("SBE") petitioned the Commission to require broadcast auxiliary and cable relay microwave stations located within Metropolitan Statistical Areas ("MSAs") to employ high-performance Category A antenna systems which are more effective at reducing interference.[1] The SBE suggested that areas of dense population such as MSAs would be most likely to have many TV broadcast stations and cable systems which would require extensive microwave distribution systems.[2] Such areas, they reasoned, would be likely to experience frequency congestion. Therefore, stations within these areas would require higher performance antenna systems to prevent interference and to minimize preclusion of new facilities. The *Notice of Proposed Rule Making*[3] ("*Notice*") in this proceeding proposed a variant of SBE's proposal. The *Notice* also solicited comments on whether some provision should be made for defining congested areas that are not in MSAs and for excluding MSAs (or portions thereof) that are not congested.

2. Based on the comments submitted by the parties and our own experience, we have decided to terminate this proceeding without taking the proposed action. The record developed in this proceeding indicates that MSAs do not reliably correlate with areas of high spectrum usage or levels of congestion, and that requiring all operators in those areas to use Category A antenna systems therefore would not necessarily produce the desired beneficial results. Moreover, imposition of such a requirement would subject numerous auxiliary and cable microwave stations to unwarranted and considerable expense. Because our current rules and procedures, with minor changes described below, will adequately resolve potential problems in congested areas, we will not significantly modify those rules or procedures here.

DISCUSSION

3. *Comments.* The National Association of Broadcasters generally supports SBE's petition, but agrees with the proposal made by the Commission in the *Notice* that some method of adding congested areas that are not in MSAs should be provided, as well as some method for deleting uncongested MSAs from any list of congested areas.[4] However, most commenters oppose the concept of using population density to determine congestion because it does not reflect actual spectrum use. There appears to be a consensus that antenna upgrades based solely on population would cause an unnecessary economic burden with no significant improvement in service. Moreover, some commenters note that physical constraints could effectively preclude many upgrades, even in genuinely congested areas, resulting in many requests for waiver of the rule & in order to avoid an expensive landline installation or a costly migration to a higher frequency band. Thus, there are a number of requests that particular MSAs be excluded from the final list of congested MSAs which the *Notice* indicated might be developed by the Commission in this proceeding.

4. For example, KVVU notes that the auxiliary service microwave bands are somewhat less congested now with the advent of satellite network program distribution systems. This has reduced the need for terrestrial intercity relay stations. KVVU also states that no congestion has been experienced in the Las Vegas market (a proposed congested area) and that there is no apparent correlation between congestion and population.

5. Richard Markey, an engineer active in coordinating broadcast auxiliary service operation in south-central Pennsylvania, anticipates that the York-Harrisburg-Lancaster area (another proposed congested area) will experience only limited growth and that any future facilities can be accommodated without antenna upgrades.

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[1] *See, Petition for Rulemaking, Definition of "Congested Areas" for Broadcast Auxiliary Purposes*, Society of Broadcast Engineers, received February 27, 1990. Effective October 1, 1991, Sections 74.641 and 78.105 of the Commission's Rules require the use of either a Category B or Category A microwave antenna. A Category B antenna represents an improvement in technical specifications over microwave antennas of earlier years and is intended for general use in the broadcast auxiliary and cable relay services. Category A antennas deliver better performance than Category B antennas (principally in the form of narrower beamwidth) and are intended to be used in congested areas when use of a Category B antenna might preclude the authorization of new service. SBE's petition sought to more clearly define what comprises a "congested area."

[2] *See* Sections 74.641(b) and 78.105(b) of the Commission's Rules which refer to "areas subject to frequency congestion." The precise meaning of this expression is not stated in the rules. In practice, only certain microwave paths within the larger radio markets are considered congested. We have recommended the general use of Category A antennas in large markets. In addition, our licensing policy has been to require the use of a Category A antenna when currently authorized facilities preclude the authorization of new service along a particular path. Thus, congestion is deemed to exist only on a case-by-case basis and no specific, Mass Media list of "congested areas" has been developed.

[3] *See, Notice of Proposed Rule Making*, 5 FCC Rcd 6687.

[4] NAB agrees with SBE's proposal that 70% channel occupancy is a reasonable threshold for determining congestion. NAB also expressed the view that once an area is designated as congested, licensees should be given two years to upgrade to a Category A antenna.

6. Larry H. Will, another engineer active in broadcast auxiliary service frequency coordination, believes that Category B antennas, with few exceptions, should be sufficient for most point-to-point communications links. He also points out that many existing towers may not be able to withstand the additional weight and wind-loading of larger microwave antennas that might be required for a Category A upgrade. Local zoning regulations could also preclude the use of a larger antenna. Like others, he requests that proposed congested areas in the southern New Jersey region be excluded from any final list of congested areas.

7. The American Broadcasting Company ("ABC") discusses the situation existing in New York City, where physical space and mounting facilities for microwave antennas are often constrained. ABC explains that required upgrades at some of these sites will actually decrease the number of available communications links because fewer larger antennas fit in the same space as existing antennas. Thus, Category A antennas in some of the microwave bands cannot fit within the alcoves of the World Trade Center in New York City. Yet, ABC says that there have been few, if any, congestion problems that could not be resolved locally, on a case-by-case basis.

8. Other commenters presented similarly convincing arguments that SBE's proposal would not serve the public interest. For example, in a number of the larger metropolitan areas, the studios for many of the broadcast stations are located reasonably close together and the studio-transmitter-links are more or less parallel and aimed toward a common mountaintop transmitter site or "antenna farm." In such cases, narrowing existing beamwidths by using Category A antennas generally will not yield additional spectrum for the use of new service entrants. However, commenters did not consider this situation a problem because the probability of new stations commencing operation in these areas is considered very small.

9. SBE agrees that no station should be required to bear the expense of an antenna upgrade where no need exists and recommends that its original submission be amended to include a "Four-Level Safety Net" exemption procedure for stations in non-congested MSAs consisting of any of the following: (1) inclusion in the Commission's proposed list of exempted MSAs; (2) demonstrating less than 70% occupancy within the boundaries of a non-exempted MSA; (3) requesting a frequency coordinating committee to recommend adding an MSA to the list of exempted MSAs; and, (4) showing that the use of a specific fixed link with a Category B antenna is not precluding the authorization of new or modified microwave links.

10. *Decision.* Our experience, as supported by comments, has been that interference and preclusion problems in the referenced services have only infrequently required Commission intervention and have been satisfactorily addressed on a local, case-by-case basis.[5] Further, we believe that the exemption procedure that SBE proposed in comments, while laudable, is nevertheless unnecessary at this time. Sections 74.641 and 78.105 of the Rules currently require use of Category B antennas in non-congested areas, but provide specifically that applicants may be required to upgrade the antenna of an existing station if such action would resolve an interference or preclusion situation. Thus, the current rules appear sufficient to resolve potential problems without adopting SBE's proposal. Requiring applicants to make showings to obtain exemptions appears unnecessary when normal frequency coordination procedures, in connection with the Commission's application processing, should reveal situations where proposed facilities could be precluded by continuing use of Category B antennas. We want to avoid requiring unnecessary upgrades that would burden stations either with the cost of the new antenna and its installation, which could be considerable, or with the expense of preparing a waiver request. This approach would also burden our processing staff by requiring them to respond to each such waiver request.

11. Licensees have now had about 10 years to upgrade their antennas to meet the Category B antenna standards. Therefore, any request for a waiver of the requirement that antennas meet at least the Category B standard should show that: (1) there are no feasible alternatives (*e.g.*, satellite network program distribution systems); and either (2) it is physically impossible to install the required category antenna at a specific location; or (3) an extremely adverse economic impact is associated with such an installation. Moreover, such waivers will be valid only as long as the facilities do not preclude the authorization of new or modified stations that would be possible were the required category of antenna in use.

12. Finally, we believe it is appropriate to extend the October 1, 1991 deadline for licensees that do not comply with Section 74.641 or 78.105 of our rules to install an antenna that complies with the rules. The new deadline will be April 1, 1992, and we are amending the rules accordingly. We take this action because some licensees have delayed the purchase of Category A or Category B antennas pending resolution of this rule making proceeding. They expected the proceeding to define congested area and determine which category of antenna they should install. There is not adequate time remaining before October 1, 1991 for these licensees to order, receive and install their new antennas. Nevertheless, by this short extension we intend only to avoid waiver requests based on the inadequate time; we do not intend to signal any diminished importance of the general conversion to Category B antennas. No further extension of this deadline is contemplated.

CONCLUSION

13. Although the MSA approach initially showed some promise as a potentially simple way to predict microwave auxiliary service congestion, the record indicates that it would produce incorrect and inconsistent results and lead to unnecessary costs. We now conclude that each metropolitan area possesses unique characteristics and that each microwave path within it must be analyzed with respect to its impact on congestion and preclusion of new service. Current procedures appear sufficient to identify and resolve congestion problems and will permit us to notify licensees when circumstances actually require upgrade to a Category A antenna. Therefore, we conclude that the current rules (Sections 74.641 and 78.105), which require

[5] Commenters presented several specific examples of stations that were located within proposed MSAs without causing interference. In many cases, new facilities could also be accommodated.

continuing cooperation among local microwave station licensees, are sufficient. This decision will avoid the adverse economic impact predicted by the majority of commenters.

FINAL REGULATORY FLEXIBILITY ANALYSIS STATEMENT

I. Need and Purpose of this action:

14. No action on the initial proposal is being taken.

II. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis:

15. The majority of comments stated that required antenna upgrades would impose severe economic impact without significant benefit to the services.

III. Significant Alternatives Considered and Rejected:

16. None.

ORDERING CLAUSE

17. Accordingly, IT IS ORDERED THAT, pursuant to Sections 4(i), (j), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), (j), and 303 (1982), effective November 19, 1991, Sections 74.641 and 78.105 of the Commission's Rules ARE AMENDED as set forth in the attached Appendix.

18. IT IS FURTHER ORDERED THAT this proceeding IS TERMINATED.

19. For further information contact Hank VanDeursen at (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

47 CFR Parts 74 and 78 are amended as follows:

1. The authority citation for Parts 74 and 78 continues to read as follows:

Authority: 47 U.S.C. Sections 154 and 303.

2. Section 74.641 is amended by revising the note that follows the table in paragraph (a)(1) and by revising paragraph (b) to read as follows:

Section 74.641Antenna systems.

(a)* * *

NOTE: Stations must employ an antenna that meets the performance standards for Category B. In areas subject to frequency congestion, where proposed facilities would be precluded by continued use of a Category B antenna, a Category A antenna must be employed. The Commission may require the use of a high performance antenna where interference problems can be resolved by the use of such antennas.

* * * * *

(b) Any fixed station licensed pursuant to an application accepted for filing prior to October 1, 1981, may continue to use its existing antenna system, subject to periodic renewal until April 1, 1992. After April 1, 1992, all licensees are to use antenna systems in conformance with the standards of this section. TV auxiliary broadcast stations are considered to be located in an area subject to frequency congestion and must employ a Category A antenna when:

* * * * *

3. Section 78.105 is amended by revising the note that follows the table in paragraph (a)(1) and by revising paragraph (b) to read as follows:

Section 78.105 Antenna systems.

(a)* * *

NOTE: Stations must employ an antenna that meets the performance standards for Category B. In areas subject to frequency congestion, where proposed facilities would be precluded by continued use of a Category B antenna, a Category A antenna must be employed. The Commission may require the use of a high performance antenna where interference problems can be resolved by the use of such antennas.

* * * * *

(b) Any fixed station licensed pursuant to an application accepted for filing prior to October 1, 1981, may continue to use its existing antenna system, subject to periodic renewal until April 1, 1992. After April 1, 1992, all licensees are to use antenna systems in conformance with the standards of this section. CARS stations are considered to be located in an area subject to frequency congestion and must employ a Category A antenna when:

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 3207

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: September 16, 1991 Released: September 16, 1991

By the Deputy Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 3207 to introduce Virtual Telecommunications Network Service (VTNS) Option 90 under which AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. VTNS Option 90 includes measured ports, Rate Option 1 measured ports, Rate Option 2 measured remote ports, and quantities of data telecommunications capability (DTC) access and network components. Option 90 also provides customers with the capability to make calls between port locations, between port and non-port locations, between non-port locations, using Type I and Type II authorization codes, and from any location in the United States, Puerto Rico, and the U.S. Virgin Islands using port access telephone numbers. Following substantially complete installation, the rates for Option 90 are stabilized for a three-year term, with an option to renew service for an additional one-year period. *See* AT&T Transmittal No. 3207 Description and Justification (D&J) at 1-4. The transmittal is scheduled to take effect September 17, 1991.

2. Williams Telecommunications Group, Inc. (Williams) filed a petition to reject or to suspend and investigate, or provide alternative relief against Option 90, Transmittal 3207, on July 5, 1991. US Sprint Communications Company Limited Partnership (Sprint) and Competitive Telecommunications Association (CompTel) filed petitions to reject or suspend and investigate Option 90, Transmittal 3207, on July 5, 1991.[1] AT&T filed a reply on July 15, 1991.

3. Sprint, Williams, and CompTel contend that Option 90 raises the same issues as the options remanded by the U. S. Court of Appeals in the *Tariff 12 Remand*[2] and must be reviewed in light of the remand. *See* Sprint Petition at 5; Williams Petition at 12; CompTel Petition at 1-4. These petitioners argue that AT&T has failed to demonstrate that Option 90 is an integrated service package that is "unlike" its component services and thus has failed to justify the discrimination between this option and AT&T's other services. *See* Sprint Petition at 6-9; Williams Petition at 8-18; CompTel Petition at 4-6, 14. These petitioners also allege that even if Option 90 could qualify as an integrated service package, its rates vary without justification from other options under Tariff 12 and are thus discriminatory. *See* Sprint Petition at 9-10; Williams Petition at 18-21 (also citing alleged similarities between Option 90 and Option 15); CompTel Petition at 8-9 (also questioning the adequacy of AT&T's cost support and contending that the Commission will need to review the underlying contracts to reliably determine whether price differences between Option 90 and other Tariff 12 options are justified).

4. Williams and CompTel argue that Option 90 impermissibly bundles 800 Service with other Tariff 12 services thereby allowing AT&T to take advantage of the lack of 800 number portability to capture almost all of a customer's other interexchange services. *See* Williams Petition at 22-23; CompTel Petition at 6-7 (also alleging that AT&T is unlawfully leveraging its market power in international services). These petitioners further claim that Tariff 12 packages are not generally available and violate the Commission's resale policy because their customized nature prevents them from being used by resellers. *See* Williams Petition at 23-25; CompTel Petition at 9-13 (also claiming that time limits placed by AT&T on the availability of a volume discount plan and other incentives in Option 90 eliminate the option's availability to all but the initial customer).

5. Williams repeats the allegation, originally submitted in its petition against Option 89, that this filing violates federal antitrust laws, citing press accounts of a recently decided, but as yet unreported, case involving an allegedly illegal advertising campaign by the Long Island newspaper *Newsday*. *Id.* at 2-5. CompTel alleges that the Option 90 rate structure for special access violates Commission policy on geographic rate deaveraging. CompTel Petition at 8-9. Finally, CompTel asserts that Option 90 cannot be considered a "turnkey" telecommunications system because customers have the capability to place calls to locations serviced by the customer's private network service, thereby indicating that Option 90 is merely an off-net service appendage to the customer's existing private network. *Id.* at 13-14.

6. AT&T replies that Sprint, Williams, and CompTel primarily continue to restate their general objections to VTNS offerings. AT&T Reply at 1. Consequently, AT&T responds to charges that Option 90 is discriminatory, that it prohibits resale, that it unlawfully bundles SDN and 800 Service, that VTNS inhibits resale, and that AT&T's cost support is inadequate, by denying those charges and citing its previously filed replies to Options 74-86. *Id.* at 8-10.

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[1] We do not address in this Order a petition submitted against Transmittal 3207 by MCI Telecommunications Corporation (MCI) on August 19, 1991, 45 days after the petition filing deadline, or AT&T's reply, filed August 29, 1991. MCI incorrectly cites Section 1.45 of the Commission's Rules, 47 C.F.R. § 1.45, as its authority for the late filing. Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773, controls the pleading cycle for petitions against tariff filings. Pursuant to subsection (a)(2)(ii) of that section, petitions against this transmittal were due no later than July 5, 1991.

[2] *MCI Telecommunications Corp. v. FCC*, 917 F. 2d 30 (D.C. Cir. 1990) (*Tariff 12 Remand*), *rev'g & remanding* AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932 (*Tariff 12 Order*), *recon. denied*, 4 FCC Rcd 7928 (1989).

7. In responding to specific allegations of Williams, AT&T replies that Williams' comparison of the rates between Option 90 and Option 15 is irrelevant, and asserts that rate differences are reasonable if they are the product of cost differences, competitive conditions, or such other neutral, rational bases. *Id.* at 2-4. Answering Williams' charge of antitrust violations, AT&T replies that Williams' tactic is not only procedurally improper but also lacks any semblance of factual or legal merit. *Id.* at 1-3. AT&T also insists that, contrary to the claims of CompTel, the Option 90 rate structure does not violate Commission policy on geographic deaveraging, that Option 90 is generally available, and that Option 90 is integrated. *Id.* at 4-8. AT&T further asserts that the Court of Appeals decision creates no basis to reject or suspend new or revised VTNS offerings. *Id.* at 9. Therefore, the most that the Commission should do is make Option 90 subject to the outcome of the remand proceeding. *Id.* at 9-10.

8. The Common Carrier Bureau has reviewed AT&T Transmittal No. 3207 the petitions filed by Sprint, Williams, and CompTel, and AT&T's reply. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection.

9. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See Tariff 12 Remand*. Although Transmittal 3207 does not present new questions that warrant investigation at this time, it could be affected by the Commission's decision in the CC Docket 87-568 remand proceedings. Therefore, Transmittal 3207 takes effect subject to the outcome of the remand proceedings in CC Docket 87-568.

10. Accordingly, IT IS ORDERED that the petitions to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 3207 filed by US Sprint Communications Company Limited Partnership, Williams Telecommunications Group, Inc., and Competitive Telecommunications Association, ARE DENIED.

11. IT IS FURTHER ORDERED that the petition to reject American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal 3207, filed by MCI Telecommunications Corporation, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLNET COMMUNICATION SERVICES, INC.
Complainant,

v.

NATIONAL EXCHANGE CARRIER ASSOCIATION	File No. E-89-196
MICHIGAN BELL TELEPHONE COMPANY	File No. E-89-198
WISCONSIN BELL TELEPHONE COMPANY	File No. E-89-200
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY	File No. E-89-230

Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: September 16, 1991 Released: September 20, 1991

By the Commission: Commissioner Marshall issuing a separate statement.

I. INTRODUCTION

1. On May 16, 1991, the Commission released an order granting in part and dismissing in part several complaints filed by Allnet Communication Services, Inc. (Allnet), pursuant to Section 208 of the Communications Act (Act), 47 U.S.C. § 208.[1] Allnet has filed petitions requesting that we reconsider, or, in the alternative, clarify, our decision with regard to its complaints against the National Exchange Carrier Association (NECA), Michigan Bell Telephone Company (Michigan Bell), Wisconsin Bell, Inc. (Wisconsin Bell), and New England Telephone and Telegraph Company (NET) (collectively referred to herein as the defendants). Wisconsin Bell has also filed a petition for reconsideration of the Commission's order insofar as it applies to Wisconsin Bell. Each party opposes the petition affecting it, and Allnet and Wisconsin Bell replied to the oppositions. For the reasons stated below, we deny both petitions.

II. BACKGROUND

2. In its complaints Allnet had alleged that, because of defendants' overstatement of inside wire costs and excessive deferred taxes, the carrier common line (CCL), traffic sensitive, and special access rates charged by defendants, which took effect on January 1, 1988, were unjust and unreasonable in violation of Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). The complaints were based largely on two Commission orders in CC Docket No. 88-1[2] in which the Commission investigated a number of issues relating to the local exchange carriers' (LECs') Annual 1988 Access Tariff Filings. In the *December 27 Order*, the Commission disallowed certain projected revenue requirements associated with inside wire installation and maintenance and excess deferred taxes. The deferred tax disallowances directly affected CCL, traffic sensitive, and special access charges. In the *April 27 Recon Order*, the Commission reexamined each disallowance questioned on reconsideration, including the two relied on by Allnet in its complaints.

3. In denying Allnet's complaints, in part, we rejected Allnet's arguments that defendants' CCL rates were unlawful as a result of inside wire expenses disallowed in the *December 27 Order*. *Allnet v. NECA*, 6 FCC Rcd at 2610. We noted that those disallowances were specifically not reaffirmed in our *April 27 Recon Order* and, therefore, were insufficient to support Allnet's claims. *Id.* Since Allnet proffered no other evidence to support its allegations of unjust and unreasonable CCL rates, we dismissed the complaints to the extent that they alleged that defendants' CCL rates were unlawful with respect to inside wire disallowances.

4. The *April 27 Recon Order* reaffirmed disallowances for excess deferred taxes, however, and we found in the complaint proceeding that the disallowances listed in Appendix C of that Order, and cited by Allnet in its complaints, constituted prima facie evidence of excess projected deferred tax in the amounts listed therein. Where the defendant carriers failed to refute or rebut this evidence in whole or in part, we found that the carriers were liable for damages. A number of defendants were able to show that the rates during the period in question were not unjust or unreasonable notwithstanding the excess deferred taxes because their actual 1988 revenue requirements were understated by a sufficient amount to offset or compensate for the disallowances stated in Appendix C of the *April 27 Recon Order*. Specifically, with respect to the CCL component of excess deferred taxes disallowances, we found that NECA's showing that actual revenue requirements for 1988 exceeded the projected amount by $28 million, more than offsetting the total amount of potential CCL refund liability shown in Appendix C of the *April 27 Recon Order*, rebutted the evidentiary basis of Allnet's complaints insofar as Allnet sought to recover deferred tax disallowances through CCL rate refunds from the defendants.

5. We also found that NET successfully rebutted claims that its 1988 traffic-sensitive rates were unlawful as a result of overstated deferred taxes by showing that, for the traffic-sensitive rate category taken as a whole, such

[1] Allnet Communication Services, Inc. v. National Exchange Carrier Association, 6 FCC Rcd 2608 (1991) (*Allnet v. NECA*).
[2] Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase II, 4 FCC Rcd 4115 (1988) (*December 27 Order*), recon., 4 FCC Rcd 3965 (1989) (*April 27 Recon Order*), *further recon.*, 4 FCC Rcd 7906 (1989), *appeal pending sub nom.* Southern Bell Telephone & Telegraph Co. v. FCC, No. 89-1081 (D.C. Cir. filed Feb. 2, 1989).

overstatements were more than offset by understatements in other traffic-sensitive expense categories. Therefore, we found that NET made a persuasive showing that its rates at issue were not unreasonable despite the excess deferred taxes.

6. On the other hand, we rejected as insufficient Ameritech's showing, on behalf of Wisconsin Bell, that its company-wide interstate access rate of return (11.92 percent) for the period covered by Allnet's complaint, based on actual data, was below authorized levels. Ameritech did not show that Wisconsin Bell failed to earn its authorized rate of return on any of the service categories at issue in Allnet's complaint. Therefore, we upheld an excess deferred taxes traffic-sensitive disallowance of $675,000 for Wisconsin Bell.

III. ALLNET'S PETITION FOR RECONSIDERATION OR CLARIFICATION

A. CONTENTIONS OF THE PARTIES

7. *Allnet's Petition.* In its petition, Allnet asserts that the Commission erred in finding that Michigan Bell, Wisconsin Bell[3] and NET were not required to make refunds because their "actual revenue requirements were understated by a sufficient amount to offset or compensate for the disallowances" stated in Appendix C of the *April 27 Recon Order*.[4] *Allnet v. NECA* at 2610. Allnet claims that subsequently filed rate of return reports (Forms 492) for each of the defendant carriers showed that they had overearned for the 1987-1988 period. Allnet recalculated the rates of return by removing the disallowed excess deferred tax expense from the annual revenue requirement for 1988, and based on these recalculations, maintains that refunds are due for the traffic sensitive and CCL category earnings, wherever excessive total interstate or excessive CCL category rates of return are shown[5] It argues that the fact that the NECA CCL pool may not have overearned is no justification for overall or category level overearnings by an individual local exchange carrier. Allnet maintains that the Commission should order refunds to the extent that the excess deferred tax disallowances pushed the defendants' rates of return in excess of their authorized rate of return for the 1987-1988 period. Allnet argues in the alternative that if the Commission refers the issue of refunds due as a result of the excess deferred tax disallowances to pending complaints against these carriers, which allege overearnings for the 1987-88 period,[6] the Commission should clarify that the deferred excess taxes disallowances should be applied in the calculations of refunds in those proceedings.

8. *Oppositions of the Carriers.* Michigan Bell, Wisconsin Bell, and NET all oppose Allnet's petition. They argue in unison that Allnet's recalculation of their reported rates of return incorrectly mixes projected expenses and actual expenses. According to defendants, the excess deferred tax disallowance was a projected revenue requirement used to determine rates. Defendants state that those rates, multiplied by actual demand, produced the actual revenues, which were used to determine the rate of return. They further explain that since some expense projections will be too high and others too low, the differences are likely to offset one another. They argue that for these very reasons, the Commission considers actual expenses to determine whether the rates for any given period are unjust and unreasonable. Defendants claim that Allnet's computations are erroneous and irrelevant because Allnet improperly attempts to deduct projected expense amounts from the actual revenue requirement in purporting to calculate defendants' rates of return.

9. *Michigan Bell's and Wisconsin Bell's Opposition.* Michigan Bell and Wisconsin Bell also dispute Allnet's characterization of the Commission's Order in *Allnet v. NECA* and argue that the relief requested by Allnet would undermine the Commission's findings and allow Allnet to recover damages without a finding that their rates were unjust and unreasonable. According to these defendants, Allnet's claim that the order in *Allnet v. NECA* affirmed certain "disallowances" attributable to the overestimation of excess deferred tax expense, and therefore compels a refund of the disallowed amounts, is unfounded. They assert that in *Allnet v. NECA* the Commission examined each carrier's actual costs and expenses and the reported rate of return and made a substantive determination whether that carrier's rates were unjust and unreasonable. The Commission's action, they argue, recognizes that once rates are in effect, the relevant consideration in determining whether rates are just and reasonable is actual costs and expenses and the rate of return based on these costs and expenses. The defendants claim that Allnet's proposed "clarification" would allow it to recover damages for an alleged incorrect projection of excess deferred tax expense even though the carrier did not actually recover those amounts. The defendants maintain that in their case, the excess deferred taxes were properly accounted for when they recorded their actual expenses and calculated their reported rates of return. They add that under Allnet's proposal, Allnet would, in effect, receive damages three times for the alleged overestimation of the excess deferred tax expense.[7]

10. Michigan Bell and Wisconsin Bell further contend that, in any event, the rates of return reported on the Form 492, filed September 30, 1989, are irrelevant to

[3] The order found Wisconsin Bell liable for excess deferred tax disallowances for switched access, but not for CCL, and directed Allnet and Wisconsin Bell to negotiate the issue of refunds accordingly.

[4] These disallowances were for excess deferred taxes. The Commission did not require refunds for them in its 1988 access tariff proceedings.

[5] During the period in question the maximum allowed rate of return for overall interstate access services was 12.25 percent, while the maximum allowed rate of return for individual access service categories was 12.4 percent.

[6] Allnet has complaints pending against Michigan Bell (File No. E-91-032), Wisconsin Bell (File No. E-91-034), and NET (File No. E-90-184), alleging that the carriers overearned during the 1987-1988 period.

[7] Defendants contend that by excluding the alleged overestimation of excess deferred tax expense from actual revenue requirements before calculating the rate of return and then determining whether the carrier's rates are just and reasonable based on this adjusted rate of return, Allnetattempts to receive damages for the same expense amount twice. Defendants further contend that since their actual expenses and reported rates of return accounted for excess deferred taxes correctly, any damages for the alleged overestimation would, in effect, allow for a third recovery under Allnet's theory.

Allnet's claim because they represent cumulative figures for the entire 1987-1988 monitoring period. The defendants point out that the rates challenged by Allnet were in effect only from January 1, 1988, through March 31, 1989. Defendants also challenge Allnet's position that Allnet should receive damages from individual carriers for alleged overestimation of excess deferred tax expense in developing CCL rates. They interpret the Commission's determination in *Allnet v. NECA* -- that the carriers pooled their actual costs and revenues for the CCL category and the pool in turn reported earnings below the authorized rate of return -- as demonstrating conclusively that the pool did not improperly recover actual expenses and that the pool members are not liable for overestimating excess deferred tax expense.

11. Finally, as to Allnet's alternative proposal to refer the issue of refunds stemming from excess deferred tax disallowances to the overearnings complaints pending against them, Michigan Bell and Wisconsin Bell assert that Allnet's proposal would have the same effect as a damage claim in the instant proceedings. They argue that Allnet's alternate proposal also ignores the distinction between projected and actual expenses and must be rejected.

12. *NET's Opposition.* NET argues that in the *April 27 Recon Order*, the Commission recognized that the overstatement of a component of a revenue requirement does not inevitably lead to an unjust and unreasonable rate and that carriers could provide "setoff" evidence to show that net errors in other relevant revenue and revenue requirement calculations produced a shortfall that exceeded the disallowances. NET contends that the Commission has already determined in the instant proceeding that NET has successfully demonstrated that its overforecasts associated with excess deferred taxes expenses were more than offset by underforecasts of other expenses, and, therefore that Allnet is not entitled to any refund as a result of NET's overforecast of excess deferred taxes. NET maintains that its final Form 492 for 1987-1988 is correct as filed and rejects Allnet's actions as an improper attempt to "recalculate" NET's earnings for that period to recover damages --that the Commission already determined Allnet is not entitled to receive.

13. *NECA's Opposition.* NECA's opposition points out that Allnet's petition neither identifies any Commission action relating to NECA in *Allnet v. NECA* nor describes any relief sought with respect to NECA. Therefore, NECA asserts that the petition cannot be read to seek reconsideration of the order as it related to NECA. It argues that the petition for reconsideration is thus procedurally deficient and substantively without merit and should be denied.

14. *Allnet's Reply.* In its reply to the oppositions, Allnet reiterates arguments based on its recalculations of the carriers' reported rates of return, and rejects the oppositions of the carriers as without merit. It claims that defendants' theories are inconsistent with the Commission's order in *Allnet v. NECA* and with prior positions taken by the defendants in these proceedings. According to Allnet, none of the defendants deny that they overearned during the 1987-1988 monitoring period, and the uncontested overearnings clearly indicate that there were no overall setoffs for these carriers. As to NECA's role, Allnet states that it included NECA in its petition as the administrator of the CCL pool. Allnet states that it properly seeks specific relief from the named carriers who overearned on their interstate services, and to the extent necessary, NECA, as administrator of the CCL pool.

15. Allnet also argues that, contrary to defendants' assertions, disallowances for improper accounting for excess deferred taxes affect both projected and actual results. It concludes that when an improper method of flowing back excess deferred taxes is used to project revenue requirements, the resulting disallowance is not affected by "actual" intervening results and remains improperly accounted for in the "actual" overstatement of revenue requirements in the Form 492. According to Allnet, "[t]he question is whether the excess deferred taxes were properly accounted for in those earnings reports *as required by the Order*. "Reply at 5 (emphasis in original). Allnet adds that "[n]either Ameritech (nor NET) allege that they corrected their Form 492 reports to reflect the Commission's ordered *correction* in the *methods* for accounting for the flow back of excess deferred taxes." *Id.*

B. DISCUSSION

16. We have carefully reviewed Allnet's arguments and the arguments submitted by other parties to this proceeding and find no reason to disturb the rationale or result of our decision. Allnet's petition purports to demonstrate that since the Forms 492 filed by the defendant carriers subsequent to the pleadings on the underlying complaints show that these carriers overearned during the 1987-1988 monitoring period, the Commission erred in determining that the actual 1988 revenue requirements of these carriers were understated by a sufficient amount to offset or compensate for the disallowances stated in Appendix C of the *April 27 Recon Order*.[8] Allnet's claims in this regard are without merit. The rate of return figures relied upon by Allnet are not relevant to the instant complaints. First, some of the overall interstate access rates of return relied on by Allnet to counter the offset claims were derived by Allnet removing the disallowed excess deferred tax expense (which was based on projected data) from the revenue requirement in the carriers' 1987-1988 rate of return reports (which reflected actual operations) and then recalculating the rate of return contained in these reports. This recalculation of the reported rate of return is fatally flawed since effectively it would preclude a carrier from offsetting disallowances of projected expenses with underestimates within the same category for purposes of calculating damages. Such an offset, however, is an integral component of the Commission's ratemaking procedures. Projections used in setting rates are simply that -- projections. It is likely that some will be too high whereas others will be too low. These high and low projections may well offset each other. Indeed, in CC Docket No. 88-1 proceedings the Commission specifically provided the carriers with an opportunity to demonstrate offsets for disallowances of projected expenses.[9] Moreover, although

[8] The only disallowance found to be offset for Wisconsin Bell was its excess tax CCL disallowance. The Commission's finding that Wisconsin Bell's traffic sensitive excess tax disallowance was not offset is the subject of Wisconsin Bell's petition for reconsideration. *See* paragraphs 18 - 23 *infra*.

[9] We note that Allnet has not shown that the actual results as

Allnet appears to argue that the deferred tax disallowances should result in refunds regardless of offsets, the Commission did not order such a procedure. Instead, the Commission specifically stated that the disallowances could be used as a basis for damages in a complaint proceeding, subject to rebuttal by, for example, showing offsets. Therefore, excess deferred taxes disallowances are treated as any other disallowance, and are not entitled to the special treatment advocated by Allnet. We therefore reject Allnet's recalculations of the total rate of return figures submitted by the defendant carriers.

17. Moreover, even Allnet's reliance on the rates of return reported by the defendants for the 1987-1988 monitoring period is unavailing in the instant complaint proceedings because those figures are for the incorrect period.[10] The disallowances at issue here are for rates in effect for the year 1988. Therefore, only 1988 data can be properly considered in determining whether the disallowances were offset by understatements in the same service category. Allnet has submitted no evidence based on 1988 figures to show that the Commission erred in finding the CCL excess deferred taxes disallowances for all of the defendant carriers, and the traffic sensitive deferred taxes disallowances for NET, were offset by understatements in the same categories. Therefore, no additional refunds are due because of excess deferred tax disallowances. Any refunds which may be due to overearnings, as evidenced by earned rates of return for the 1987-1988 monitoring period in excess of the authorized rate of return must be recovered in the pending rate of return complaint proceedings.[11] Accordingly, we deny Allnet's petition for reconsideration or clarification.

IV. WISCONSIN BELL'S PETITION FOR RECONSIDERATION

A. CONTENTIONS OF THE PARTIES

18. Wisconsin Bell seeks reconsideration of the Commission's finding of liability for overestimating deferred tax expenses in calculating its traffic sensitive rates. Wisconsin Bell argues that under the Commission's own standards for liability it cannot be liable for damages since it reported only a 9.8 percent rate of return on its traffic sensitive access category for the period January 1988 through March 1989, approximately $4.1 million below what the category would have produced if it had earned at the authorized rate of return. These underearnings, WisconsinBell states, are well in excess of the $675,000 figure the Commission found to be attributable to overestimated excess deferred taxes. Moreover, Wisconsin Bell maintains that the Commission erred in basing its liability finding on specific category earning levels rather than on overall earning levels. It argues that the standard for determining liability required by the court's decision in *AT&T v. FCC*, 836 F. 2d 1386 (D.C. Cir. 1988) must be based on overall interstate regional rate of return, not on the rate of return reported for a particular access charge category.[12]

19. Wisconsin Bell states that it submitted information showing a 9.8 percent rate of return for traffic sensitive access services for the first time in its petition because prior to the Commission's order, it had no notice or reason to believe that the Commission would adopt the category earnings level standard, and consequently, did not perceive the information relevant in the complaint proceeding. Further, it asserts that if the Commission had held the hearing Wisconsin Bell claims was required by the Administrative Procedure Act, 5 U.S.C. §554(1), it might have become aware of the liability standard the Commission was contemplating and could have provided the information which would have demonstrated that it should not be held liable. Therefore, Wisconsin Bell concludes that the Commission should accept this information now and find that Wisconsin Bell is not liable for damages for overestimating excess deferred tax expenses.

20. In opposition to Wisconsin Bell's petition, Allnet argues that the affidavit submitted by Wisconsin Bell purporting to show a 9.8 percent rate of return for its traffic sensitive category should be rejected as irrelevant, untimely, and not authoritative.[13] Allnet asserts that the information contained in the affidavit is irrelevant since it includes figures based on the period January 1988 through March 1989 rather than just 1988, the period covered by the complaint. Allnet also rejects as unfounded Wisconsin Bell's arguments regarding regional-based earnings and the claim that Wisconsin Bell lacked notice of the Commission's category level standard for overearnings.

21. In reply Wisconsin Bell maintains that the rate of return for the rates "that became effective January 1, 1988" is the relevant rate of return for purposes of Allnet's complaints.[14] Wisconsin Bell argues that since the rates were actually in effect from January 1, 1988, through March 31, 1989, that is the relevant time period for determining liability.[15] Finally, Wisconsin Bell argues

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reported by the LECs on their Form 492 submissions do not include the proper amount of deferred tax expense. Removing disallowances based on projected revenue requirements from actual results, as Allnet proposes, could well have the effect of deducting them twice.

[10] On their Forms 492 filed on or about September 30, 1989, Michigan Bell reported aCCL rate of return of 12.59% and NET reported a traffic sensitive rate of return of 13.24% -- rates of return higher than the maximum allowed rate of return for the 1987-1988 monitoring period.

[11] We can discern no creditable basis for Allnet's request that disallowances for excess deferred taxes which did not result in refunds in the instant complaint proceedings be applied to calculations of overearnings for the January 1, 1987-December 31, 1988, reporting period. This appears to be little more than a third attempt to argue that excess deferred tax amounts should be refunded without regard to potential offsets or questions of the reasonableness of rates during the relevant period.

[12] According to Wisconsin Bell, the Commission admits that the court's decision requires it to consider overall interstate access earnings rather than access category earnings, quoting from the Conditional Suggestion for Rehearing En Banc filed March 7, 1988, by the Commission in *American Tel. & Tel. Co. v. FCC*, No. 85-1778 (D.C. Cir) at 9, n. 7.

[13] It claims that the affidavit is not signed by an officer of Wisconsin Bell, the carrier, as required for a Form 492 filing. However, if the Commission accepts this evidence, it requests the opportunity to depose the affiant "to get at the basis of these new earnings claims". Opposition at 3.

[14] Reply at 3-4.

[15] As for Allnet's claim that a Form 492 must be signed by an officer of the carrier, it points out that it did not submit a Form

that the Commission's decision in *MCI Telecommunications Corp. v. Pacific Northwestern Bell Telephone Co.*[16] which Allnet claims should have put Wisconsin Bell on notice of the Commission's liability standard, was not announced until December 12, 1989, several months after the pleadings were filed in response to Allnet's complaint. Moreover, Wisconsin Bell claims that the information contained in its petition for reconsideration does not provide additional information as much as details of information already in the record. In any event, Wisconsin Bell concludes, the Commission should find that based on Wisconsin Bell's 9.8 percent rate of return for the traffic sensitive access category during the period the rates filed in the 1988 access filing were in effect, its rates were not unjust and unreasonable.

B. DISCUSSION

22. We have rejected Allnet's petition in part as primarily based on information concerning the defendants' rates of return for the entire 1987-1988 monitoring period and not just the period (1988) at issue in the complaints. We similarly reject Wisconsin Bell's arguments that Allnet's claims are defeated because Wisconsin Bell underearned on its traffic sensitive services for the period January 1, 1988, through March 31, 1989. While we recognize that the 1988 access year extended until March 31, 1989, the disallowances listed in Appendix C of the *April 27 Recon Order* were based on 1988 revenue requirements, not a combination of 1988 and 1989 revenue requirements. Therefore, any offsets must be determined with reference to the rates in effect during the relevant period. Since Wisconsin Bell has presented no evidence of 1988 offsets in the traffic sensitive category,[17] we deny its petition for reconsideration.

23. We note that in *Allnet v. NECA* we directed the parties to work cooperatively to achieve a settlement on the issue of the amount of damages. We stated that if no agreement is reached within ninety days of the release of that Order, we would establish further proceedings to resolve the issue of damages. Consistent with our findings and conclusions in this Order, we hereby extend the period of negotiations between Allnet and Wisconsin Bell on the issue of damages for a period of ninety days from the release of this Order. The parties are further directed to report back to the Common Carrier Bureau's Enforcement Division within thirty days of the release of this Order as to whether an agreement has been reached or to report what progress has been made and the need for Bureau assistance.

V. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED that the Petition for Reconsideration Or, in the Alternative, Clarification, filed by Allnet Communication Services, Inc. IS DENIED.

25. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by Wisconsin Bell, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Separate Statement of Commissioner Sherrie P. Marshall

Re: Allnet Communication Services, Inc. v. National Exchange Carrier Association, *et al.* (File Nos. E-89-196, E-89-198, E-89-200 & E-89-230)

I would not be surprised if the parties to this proceeding felt like Alice in Wonderland as they encountered a series of bewildering and apparently changing obstacles in their paths.

I do not quarrel with our specific rulings here. But I am concerned that the principles guiding the resolution of this and many other complaint proceedings are too often left unnecessarily obscure. Admittedly, we have broad discretion in these proceedings under the Communications Act. But that does not mean we should fail to state, in plain and simple English, the principles we will apply to determine *when* remedies are due and *how* those remedies will be calculated.

Murky rulings, such as in the proceeding at hand, encourage litigants on both sides to game the process -- to the detriment of consumers and competition alike. The parties and the public they serve deserve a complaint

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492 in this proceeding, but rather an affidavit signed by the person responsible for filing the Forms 492 for all Ameritech Operating Companies, and is thus sufficiently authoritative.

[16] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon . denied.*, 5 FCC Rcd 3464 (1990), *appeal pending sub nom.*, Mountain States Tel. & Tel. Co., *et al.* v. FCC, Case No. 90-9510 *et al.* (10th Cir. filed March 6, 1990).

[17] In any event, Wisconsin Bell's argument that the standard for determining liability must be based on a carrier's overall rate of return, not oncategory level earnings, was rejected by the Commission in the *MCI Liability Order*, 5 FCC Rcd at 223. A carrier cannot be permitted to charge excessive rates in one service category as long as its overearnings are balanced by a shortfall in another service category. The prevention of cross-subsization has long been recognized as a lawful objective of rate regulation. *See, e.g. Nader v. FCC*, 520 F. 2d 182 (D.C. Cir. 1975). A carrier may be required to make whole those who have been injured by cross-subsidized rate structures regardless of whether the carrier has achieved its authorized return overall. *Id.* at 201, 202-203. Wisconsin Bell's claim that it was unaware of the Commission's standard for determining liability is unavailing. The relevant standard must be applied in this complaint proceeding regardless of when Wisconsin Bell became aware of the standard. Since we have denied Wisconsin Bell's petition for other reasons, we do not reach the question of whether the earnings data submitted with its petition in support of its offset claims was timely. Finally, contrary to Wisconsin Bell's contentions, we have previously rejected the notion that the APA requires a hearing before an administrative law judge to resolve issues such as those raised in Allnet's complaints. *See, e.g., Comark Cable Fund III*, 104 FCC 2d 451 (1985) (other history omitted).

proceeding that is more than a Mad Hatters' Tea Party. This Commission should further that goal by more fully explaining the basis for its rulings.

Before the
Federal Communications Commission
Washington, D.C. 20554

GC Docket No. 91-119

In the Matter of

Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party

INITIAL POLICY STATEMENT AND ORDER

Adopted: September 26, 1991 Released: September 30, 1991

By the Commission:

I. INTRODUCTION

1. The Commission issued a *Notice of Inquiry (NOI)* [1] in this proceeding to examine the use of alternative dispute resolution procedures (ADR) in Commission proceedings and proceedings in which the Commission is a party. The comments[2] submitted in response to the *NOI* support the use of alternative dispute resolution procedures, and we hereby issue an initial policy statement endorsing their use in Commission proceedings. We also amend our rules to recognize adoption of this initial policy statement. We shall also initiate an ADR pilot project to test the effectiveness of ADR procedures in resolving particular types of Commission disputes. These matters as well as additional issues raised by the commenters are discussed in detail below.

II. BACKGROUND

2. As explained in our *NOI*, Congress amended the Administrative Procedure Act through enactment of the Administrative Dispute Resolution Act (ADRA) and the Negotiated Rule Making Act (NRA). [3] The ADRA and NRA authorize administrative agencies to use arbitration, mediation, settlement negotiation, negotiated Rule Making, and other consensual methods of dispute resolution.[4] Specifically, the ADRA requires the Commission, upon consultation with the Administrative Conference of the United States (ACUS) and the Federal Mediation and Conciliation Service (FMCS),[5] to adopt a policy statement addressing the use of alternative means of dispute resolution in the following areas: a) formal and informal adjudications; b) Rule Makings; c) enforcement actions; d) issuing and revoking of licenses or permits; e) contract administration; f) litigation brought by or against the agency; and g) other agency actions.[6]

3. The NRA focuses on the use of alternative dispute resolution procedures in agency Rule Makings, and is intended to lead to more effective rules and less litigation through the establishment of committees for the development of consensus positions concerning proposed rules.[7] Negotiated Rule Making committees are to be established and administered under the procedures of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 1, as implemented by the General Services Administration's rules set forth at 41 C.F.R. Part 101-6.[8]

4. As stated in our *NOI*, the Commission's primary objective is to implement the ADRA and NRA by encouraging the use of alternative dispute resolution procedures, including negotiated Rule Making, where such practice is consistent with our statutory mandate.[9] Commenters were asked to make recommendations concerning the types of Commission proceedings they believe would be appropriate (or inappropriate) for handling under either alternative dispute resolution or negotiated Rule Making. We also asked commenters to address any procedural rule changes they believe may be required to implement the ADRA and NRA.[10]

5. Finally, as required under the ADRA and discussed in our *NOI*, we already have designated an alternative dispute resolution specialist to serve as the Commission's liaison with ACUS and FMCS, and as coordinator of the Commission's ADR implementation.[11] We have also established an ADR Working Group with representatives from every Commission bureau and office to assist the ADR Specialist in implementing the Commission's ADR Program. The Commission's ADR Working Group has already met to discuss its goals and objectives, which are to survey Commission programs and identify areas and proceedings that might be appropriate for alternative dispute resolution or negotiated Rule Making; to identify the need for Commission training; and to evaluate the Commission's pilot program and its potential for expansion.

III. DISCUSSION

A. Introduction

6. The commenters generally support the Commission's use of alternative dispute resolution procedures and negotiated Rule Making.[12] A number of commenters have noted that the Commission has successfully employed alternative dispute resolution and negotiated Rule Making on an informal basis in the past.[13] For example, CDS notes that the Commission uses conciliation and mediation techniques in formal and informal complaint resolution processes in the Common Carrier Bureau and relied on negotiated Rule Making in the Part 68 Rule Making and in the establishment of Exchange Network Facilities for Interstate Access (ENFIA) charges proceeding.[14]

7. In this same regard, NAB observes that "[t]he Commission has already taken a significant step towards use of ADR in licensing disputes by authorizing parties to seek the appointment of a neutral settlement judge to assist them in reaching an agreement," *see* 47 C.F.R. § 1.244. According to NAB, "[n]eutral evaluators and mediators may be able to bring both disputed license proceedings and proceedings involving petitions to deny renewals of existing stations to a rapid conclusion without burdening the Commission's resources and with fewer demands upon the parties' resources."[15]

8. GTE points to complaint procedures and the private radio frequency coordination as specific examples of alternative dispute resolution and the assignment processes by which the Docket 20099 Settlement Agreement and the ENFIA Agreement were achieved as illustrative of negotiated Rule Making.[16] FCBA emphasizes the Commission's successful use of negotiated Rule Making in the ENFIA

proceeding, the Industry Advisory Committee to WARC-92 and the Advisory Committee on Advanced Television Systems,[17] and USWC notes that the Commission has in the past relied on "cooperative efforts among various parties to produce recommendations on policy and standards issues."[18]

B. Initial Policy Statement

9. The comments in this proceeding have persuaded us that ADR techniques can play an important role in Commission proceedings.[19] By adoption of this *Initial Policy Statement and Order*, the Commission is taking the first step in committing itself to the use of alternative dispute resolution techniques to expedite and improve its administrative processes. Toward this end, the Commission will make every effort possible to resolve appropriate disputes through mediation, arbitration, settlement negotiation, negotiated Rule Making and other means of dispute resolution where the parties involved consent to their use and where such practice is consistent with our statutory mandate. We have successfully employed alternative dispute resolution techniques on an informal basis in past Commission proceedings. Based on that experience, we are confident that alternative dispute resolution procedures provide us with an effective tool for dealing with conflict, while avoiding the expense and the delay of adversarial proceedings.

10. To implement our initial alternative dispute resolution policy, we have already taken the following initial steps:

- Designated an agency ADR Specialist responsible for the implementation of the Commission's ADR policy;
- Established an ADR Working Group with representatives from every Commission bureau and office to assist the ADR Specialist in implementing the Commission's ADR Program. The ADR Working Group will survey current Commission programs and identify areas and proceedings that might be amenable to alternative dispute resolution or negotiated Rule Making;
- Begun reviewing Commission resources to determine the extent to which the Commission can establish a training program for Commission personnel in order to institutionalize the skills and knowledge needed to make effective use of ADR procedures.

11. Further, we will initiate an ADR Pilot Project to test the effectiveness of ADR procedures in the resolution of formal complaints brought pursuant to section 208 of the Communications Act, 47 U.S.C. § 208, which are handled by the Enforcement Division of the Common Carrier Bureau. The pilot project is discussed below. Moreover, as indicated in our *NOI*, we intend to review our contracts and other standard agreements as directed by section 3(d) of the ADRA as soon as the Federal Acquisition Regulation (FAR) is amended, pursuant to section 3(d)(2)(A) of the ADR, and take action, if necessary.[20] Finally, we agree with Endispute that it is crucial to the continued effectiveness of our ADR policy to reexamine it based on our practical experience with ADR on an ongoing basis.[21] Accordingly, we are directing the Commission's ADR Specialist to evaluate the Commission's ADR policy on a regular basis.[22]

12. In furtherance of this new policy, we support and encourage all Commission personnel to be aware of opportunities to resolve controversies through alternative means of dispute resolution and to bring such matters to the attention of the Commission's ADR Specialist or any member of the ADR Working Group. We also strongly encourage those who invoke the Commission's processes to seriously consider the use of alternative dispute resolution techniques or negotiated Rule Making. We intend to honor the results of ADR unless they are inconsistent with our statutory mandate. We emphasize that these techniques are purely voluntary and that any parties choosing not to use ADR procedures will not be penalized in any manner. However, a good faith effort to avoid protracted litigation will benefit both the private parties involved and the American public.

C. Pilot Project

13. The commenters presented a wide variety of views concerning the types of proceedings in which ADR techniques should be used. We do not at this time rule out the use of ADR procedures in any specific type of Commission proceeding. Parties are free at any time to propose the use of ADR procedures and we shall examine each proposal on a case-by-case basis.[23] However, in order to focus our efforts and resources, we have decided to initiate an ADR pilot project to test the effectiveness of ADR procedures. As Endispute noted in its reply comments, by implementing an ADR pilot program in a limited group of cases, we will generate hard data about the effectiveness of the ADR which will not only help us refine our initial ADR policy, but also demonstrate its merits to the affected public.[24]

14. A number of commenters endorsed use of ADR in formal complaint proceedings, particularly those brought pursuant to section 208 of the Communications Act, 47 U.S.C. § 208.[25] According to FCBA, section 208 complaints may present us with our "greatest opportunity for implementation of ADR techniques," because of the increasing numbers of these complaints, and the fact that they often involve private disputes between parties which are unlikely to be of precedential value or bear upon significant issues of Government policy under ADRA guidelines.[26]

15. In light of these comments, we have decided to develop an ADR pilot project that will focus on the resolution of formal complaints brought pursuant to section 208 of the Communications Act, 47 U.S.C. § 208. Currently, parties to section 208 complaints may, at the Commission's discretion, be directed to attend a settlement conference presided over by the Enforcement Division, Common Carrier Bureau, to discuss settlement of the case.[27] We shall take the opportunity at these settlement conferences to encourage parties to these formal complaints to test the option of resolving these disputes through alternative dispute resolution procedures.[28] In developing this pilot project, we will consider whether to adopt an FCC roster of experienced private mediators and whether FCC personnel should be trained as mediators. The pilot project will help provide valuable experience in determining how to broaden the program Commission-wide and provide guidance in developing a final ADR policy statement.

D. Procedural Matters

16. While a number of procedural issues were raised by commenters, we have decided to obtain practical experience in the alternative dispute resolution and negotiated Rule Making process before deciding whether we need to adopt specific rules to implement ADR procedures. We concur in FCBA's assessment that this round of comments "represents a preliminary effort to set forth basic concepts and positions with respect to the use of ADR procedures by the Commission," that "further refinements can be developed," and that these refinements should come through a subsequent *NOI* or *NPRM*.[29] Before adopting a final policy statement, we intend to seek comment on the procedural issues identified by the commenters, as well as any other issues that come to our attention as a result of the pilot project.

E. Section 582 Interpretation

17. An issue raised by CDS concerns our interpretation of section 582 of the ADRA. CDS expressed concern that our *NOI* and a number of other commenters interpreted too narrowly the cautionary language of 5 U.S.C. § 582 which lists six situations[30] where an agency "shall consider not using a dispute resolution proceeding."[31] While, as indicated in our *NOI*, Congress emphasized in the ADRA that alternative dispute resolution procedures are voluntary and not necessarily appropriate in every case, we agree with CDS that the legislative history supports a finding that the ADRA should not be read to preclude entirely the use of ADR in the six situations enumerated. We recognize, of course, that there may be situations in which the use of ADR procedures would be inappropriate.

F. Specific Negotiated Rule Making Issues

18. Commenters raised a number of specific issues concerning negotiated Rule Making.[32] CDS asks for clarification from the Commission as to whether "facilitated Rule Making," such as was used in the Part 68 or ENFIA proceedings, may still be applied or whether the NRA is to be followed exclusively.[33] In this same vein, FCBA emphasized that ADR procedures are "alternatives to traditional administrative proceedings," and as such, "supplement rather than limit other dispute resolution methods that the agency employs."[34] We agree with CDS' and FCBA's reading of the NRA that it was not meant to supplant or forbid existing agency procedures.[35]

19. Pacific Bell, while generally supportive of the use of negotiated Rule Making, proposes that we also seek comment from the public as to the membership on the Rule Making committee before a notice is issued in the *Federal Register* listing the negotiated Rule Making committee members to ensure that all interested and affected parties are represented.[36] According to Pacific Bell, the Commission could issue a notice in the *Federal Register* of its intent to form a committee, with a description of the subject and scope of the rule, and require parties to file applications within 30 days, providing information about their interest in becoming a member of the committee, why they cannot be represented by another party, and their willingness to try to reach consensus with the other committee members. Within 30 days the Commission would determine the composition of the committee and issue the proper notice pursuant to section 581(a) of the NRA.

20. Because a number of commenters have expressed concern that use of ADR and negotiated Rule Making procedures could be used to stall rather than expedite Commission processes, we are reluctant at this time to add any additional time delays to these processes without clear evidence that the additional procedural protections proposed by Pacific Bell are warranted.[37] In the absence of such evidence, we will follow the NRA as enacted. We will, of course, remain sensitive to this issue in any negotiated Rule Makings we conduct to ensure the proper representation of parties. Moreover, in addition to encouraging our ADR Working Group and other Commission employees to submit recommendations concerning possible Rule Making candidates for NRA, we are asking members of the affected public to forward their proposals for negotiated Rule Making to our ADR Specialist for consideration.

G. Use of Neutrals

21. A number of issues arise concerning the use of neutrals[38] (*e.g.*, mediators, arbitrators), such as whether Commission employees will act as neutrals, whether we will rely on other governmental agencies for this purpose, whether we will permit parties to hire private neutrals, and if such is the case, who will pay for these services. CDS asked us to elaborate as to how we will use conveners[39] and facilitators[40] in negotiated Rule Making, and to indicate, tentatively or otherwise, when and under what circumstances we would consider an FCC employee to be sufficiently neutral to serve as a facilitator.[41]

22. MCI recommends making non-Commission personnel available as neutrals, at the option of either party.[42] MCI agrees with FCBA's suggestion that, with respect to government employees, "it would be prudent to identify several individuals in each bureau who would receive training" or use employees from other governmental agencies to assure that those "privy to confidential information in one [Commission] proceeding do not rely on that information in a subsequent proceeding."[43] FCBA also observes that it is common practice for the parties (not the Commission) to be held responsible for the compensation of private neutrals. They also urge the Commission to consider an "individual's willingness to serve on a *pro bono* basis as a qualifying factor" when developing its list of approved neutrals.[44]

23. Upon consideration of the comments, we will afford parties the choice of employing neutrals from private sources at their own expense. It may be that in certain cases where the parties are unable to afford the services of a private entity, federal monies may be made available to absorb these costs. This is a matter that is under consideration but it is not likely that such monies will be available during the pilot project. In addition, as discussed above, we will be considering during our pilot project whether to make Commission employees available for mediation. While there may be some experienced Commission employees available during the pilot project, the Commission will also be considering whether to develop a program to train more employees in ADR techniques.

IV. CONCLUSION

24. After considering the record developed herein, the Commission reaffirms its belief that adoption and publication of this initial alternative dispute resolution policy will demonstrate our commitment to implementation of

the Administrative Dispute Resolution Act and Negotiated Rule Making Act, and the use of alternative dispute resolution in Commission proceedings and proceedings in which the Commission is a party. In addition, as recommended by Bellsouth, we are adopting a general provision in Part 1 of the Rules recognizing the adoption of this initial ADR policy statement, and, as a matter of policy, encouraging the use of ADR techniques in proceedings where it will appear that the public interest will be served thereby.[45]

25. Accordingly, IT IS ORDERED that the *Initial Policy Statement* set forth herein is ADOPTED, TO BE EFFECTIVE upon publication in the Federal Register.

26. IT IS FURTHER ORDERED, that Part 1 of the Commission's rules IS AMENDED, as set forth in Appendix A, TO BE EFFECTIVE upon publication in the Federal Register.

27. The notice and comment and effective date provisions of the Administrative Procedure Act do not apply to this *Initial Policy Statement and Order*, including the rule amendment, which merely sets forth the Commission's general policy to encourage the use of alternative means of dispute resolution. The consent of all parties is required before ADR methods are used, and parties who decide not to participate are not penalized. 5 U.S.C. §§ 553(b)(A), (d)(2).

28. Authority for this action is contained in sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 4 U.S.C. §§ 154(i), 303(r), and the Administrative Dispute Resolution Act, Pub. L. No. 552, 101st Cong., 2d Sess. (Nov. 15, 1990); 5 U.S.C. §§ 582, 584-586.

29. Further information on this proceeding may be obtained by contacting Sharon B. Kelley, Office of General Counsel, 202/632-6990.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Part 1 of Title 47 of the C.F.R. is amended as follows:

1. The authority citation for Part 1 continues to read: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. Section 1.18 is added to 47 C.F.R. Part 1, to read as follows:

1.18 Administrative Dispute Resolution

The Commission has adopted an initial policy statement that supports and encourages the use of alternative dispute resolution procedures in its administrative proceedings and proceedings in which the Commission is a party, including the use of regulatory negotiation in Commission Rule Making matters, as authorized under the Administrative Dispute Resolution Act and Negotiated Rule Making Act.

(5 U.S.C. 581-593 (1990); Pub. L. No. 552, 101st Cong., 2d Sess. (Nov. 15, 1990); Pub. L. No. 648, 101st Cong., 2d Sess. (Nov. 29, 1990)).

FOOTNOTES

[1] 6 FCC Rcd. 2267 (1991).

[2] Comments were received from the following: American Telephone and Telegraph Company (AT&T); Ameritech Operating Companies (Ameritech); The Association for Maximum Service Television, Inc. (AMST); Bellsouth Corporation (Bellsouth); The Cellular Telecommunications Industry Association (CTIA); The Center for Dispute Settlement and James R. Hobson (CDS); The Federal Communications Bar Association (FCBA); GTE Service Corporation (GTE); MCI Telecommunications Corporation (MCI); Metropolitan Fiber Systems, Inc. (MFS); The National Association of Broadcasters (NAB); Pacific Bell Telephone Company (Pacific Bell); Southwestern Bell Telephone Company (SWBT); Spectrum Measurement Corporation (SMC); The United States Telephone Association (USTA); U.S. West Communications, Inc. (USWC). Reply comments were received from the following: Allnet Communications Services, Inc. (Allnet); CDS; Endispute, Inc. (Endispute); MCI; MFS; Pacific Bell; and USTA.

[3] *See* Pub. L. No. 552, 101st Cong., 2d Sess. (November 15, 1990) and Pub. L. No. 648, 101st Cong., 2d Sess. (November 29, 1990), respectively.

[4] As indicated in our *NOI*, "[t]he definition of alternative dispute resolution in the ADRA technically applies to 'any procedure that is used in lieu of an *adjudication* . . . . ' *See* section 581(3) of the ADR." Thus, we directed all comments on Rule Making matters to the discussion of the NRA. 6 FCC Rcd. at 2268 (emphasis added).

[5] *See* section 3(a)(1) of the ADRA.

[6] *See* section 3(a) of the ADRA. The ACUS and FMCS have informally reviewed this initial ADR policy statement. The Commission will formally consult with ACUS and FMCS prior to the adoption of a final ADR policy statement.

[7] *See* section 2 of the NRA.

[8] 5 U.S.C. § 585.

[9] 6 FCC Rcd. at 2267 (1991).

[10] *Id.* at 2268.

[11] *Id.* at n. 2.

[12] For example, FCBA "welcomes the inclusion of ADR techniques among the tools available for resolution of administrative disputes," and believes "that use of ADR can help to make FCC proceedings more efficient, less costly and complex." *See* comments of FCBA. USTA "encourages the Commission to proceed in its efforts to implement alternative dispute resolution and negotiated Rule Making procedures." *See* comments of USTA. Bellsouth indicates that it and many other local exchange and interexchange carriers have subscribed to corporate policy statements pledging to consider ADR prior to engaging in full scale litigation. *See* comments of Bellsouth. AT&T suggests that negotiated Rule Making procedures should only be used "in those circumstances where they can facilitate more expeditious Rule Making and dispute resolution than the more formal existing procedures." *See* comments of AT&T. MFS argues that rather than considering the adoption of ADR methods, we should focus our efforts on "the rigorous application of the procedural mechanisms already in place, such as those applicable to formal complaints under 47 C.F.R. § 1.720, et seq." *See* comments of MFS; *see also* reply comments of MCI. One commenter dissented against the use of alternative dispute resolution proce-

dures on the basis that they will divert attention away from the real issue of "solving basic problems with the existing formal complaints process." *See* reply comments of Allnet.

[13] In this regard, Bellsouth emphasizes that both the ADRA and NRA recognize that "agencies have had authority under existing legislation to utilize ADR techniques prior to their adoption." *See* comments of Bellsouth.

[14] *See also* comments of CDS; FCBA. Bellsouth notes that the "Commission has frequently utilized ADR techniques in resolving formal and informal complaints" and employed "a form of negotiated Rule Making in connection with standard setting, particularly with regard to technical standards." Bellsouth also points to an article by Stuart Brotman, *Communications Policy-Making at the FCC: Past Practices, Future Direction*, 7 Cardozo Arts and Ent. L. J. 55 (1988), as illustrating that beneficial results have been obtained with negotiation. They also note that ADR techniques are increasingly being used by the courts. *See* comments of Bellsouth.

[15] *See* comments of NAB; reply comments of CDS.

[16] *See* comments of GTE.

[17] *See* comments of FCBA.

[18] *See* comments of USWC.

[19] Alternative means of dispute resolution is defined in the ADRA as "any procedure that is used, in lieu of an adjudication . . . to resolve issues in controversy, including but not limited to settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration or any combination thereof." 5 U.S.C. § 581(3).

[20] The FAR is to be amended within one year of the ADR's enactment.

[21] *See* reply comments of Endispute.

[22] *Id.* We also agree with Endispute that such evaluations be done at designated intervals in the form of a written report that includes: 1) recommendations for improvement/refinement of the process; and 2) comparisons of the costs of dispute resolution under ADR procedures compared with the procedures already in place. In addition, we will follow Endispute's suggestion that procedures be established for obtaining feedback from parties who use ADR and case studies for training of Commission staff. *Id.*

[23] With respect to many of the reservations expressed about the suitability of ADR to certain kinds of cases, we agree with CDS that many of these concerns can be answered by "the underlying reality that ADR is consensual." *See* reply comments of CDS.

[24] *See* reply comments of Endispute.

[25] *See* comments of FCBA; CTIA; USWC; Ameritech; MCI; and USTA.

[26] *See* comments of FCBA.

[27] *See* 47 C.F.R. § 1.732.

[28] As reflected in our initial ADR policy statement, this ADR pilot project will have no impact on parties who do not wish to participate in ADR methods, as the consent of all parties is required. We also will be considering, as part of our ADR pilot project evaluation, whether it is appropriate to impose a time limit for parties to engage in the negotiation process.

[29] *See* comments of FCBA. *See also* comments of NAB, where they indicate that because of our *NOI*'s brevity and lack of specific proposals, they trust we will be soliciting further comment on proposed specific amendments to the Commission's rules.

[30] These six categories are as follows: 1) precedent setting cases; 2) cases bearing on significant new policy questions; 3) cases where maintaining established policies is of special importance; 4) cases significantly affecting persons or organizations; 5) cases where a formal record is essential; and 6) cases where the agency must maintain continuing jurisdiction with authority to alter its disposition in light of changed circumstances. *See* 5 U.S.C. § 582(b).

[31] *See* comments and reply comments of CDS.

[32] *See* discussion in ¶ 3, *supra*. Negotiated Rule Making is defined in the NRA as "Rule Making through the use of a negotiated Rule Making committee." 5 U.S.C. § 582(6).

[33] *See* comments of CDS.

[34] *See* comments of FCBA.

[35] *Id. See* 5 U.S.C. § 581, which provides that the NRA should not "be construed as an attempt to limit innovation and experimentation with the negotiated Rule Making process or with other innovative Rule Making procedures otherwise authorized by law."

[36] *See* comments of SWBT; USWC. A similar idea was proposed by USWC.

[37] *See* 5 U.S.C. § 584(b).

[38] A neutral is defined in the ADRA as "an individual who, with respect to an issue in controversy, functions specifically to aid the parties in resolving the controversy." *See* 5 U.S.C. § 581(9).

[39] The NRA defines a convener as "a person who impartially assists an agency in determining whether the establishment of a negotiated Rule Making committee is feasible and appropriate in a particular Rule Making." *See* 5 U.S.C. § 552(3).

[40] A facilitator is defined as a "person who impartially aids in the discussions and negotiations among the members of a negotiated Rule Making committee to develop a proposed rule." *See* 5 U.S.C. § 553(4).

[41] USWC generally proposes that the Commission maintain a roster of arbitrators or neutrals "with technical expertise, including a good grounding in basic economic principles, fair and unbiased professional judgment, in-depth knowledge in the subject matter of the particular dispute, and sufficient background in common carrier matters to put the issues in perspective . . . as opposed to having to educate someone who is a generalist." *See* comments of USWC.

[42] One method of selection, suggested by SWBT, would be submitting a list of potential neutrals to both parties and selecting the single neutral ranking *See* comments of SWBT.

[43] *See* comments of FCBA; *see* also reply comments of MCI.

[44] *See* comments of FCBA.

[45] *See* comments of Bellsouth.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: October 2, 1991

Report No. I 6620

REQUEST FOR INTERNATIONAL SECTION 214 AUTHORIZATION File No. I-T-C-90-102/CC Docket No. 90-337, Phase II

Cable & Wireless Communications, Inc. (C&W) has requested that the Commission authorize for interconnection with the public switched telephone network facilities previously approved for the provision of private line service between the United States and Canada. It also requests authorization to use such facilities for the provision of private line service beyond the United States and Canada. The Common Carrier Bureau deferred consideration of such authorization requests in its order approving C&W's acquisition of facilities for the provision of private line service in File No. I-T-C-90-102, 6 FCC Rcd 236 (1991).

Parties are invited to comment on C&W's request, filed by letter dated September 9, 1991. All timely-filed comments and replies will be considered in connection with the above-referenced application. All filings received also will be incorporated in the record in CC Docket No. 90-337, Phase II, *Regulation of International Accounting Rates, Further Notice of Proposed Rule Making*, 6 FCC Rcd 3434 (1991).

Comments may be filed no later than October 15, 1991. Replies may be filed no later than October 25, 1991. All comments and replies should reference File No. I-T-C-90-102 and CC Docket No. 90-337, Phase II. Parties must file an original and 6 copies of their comments and replies. If parties want each Commissioner to receive a personal copy of their comments, an original plus eleven copies must be filed. Parties should also file one copy with the Commission's copy contractor, Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036, (202) 452-1422. Copies of the C&W request, as well as all comments and replies, will be available for public inspection in Room 533, 1919 M Street, N.W. and in the Dockets Reference Room, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

For further information contact Susan Lee O'Connell at (202) 632-3214.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS Transmittal No. 3259

Tariff F.C.C. Nos. 1, 2, 9

MEMORANDUM OPINION AND ORDER

Adopted: September 30, 1991 Released: September 30, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. AT&T Communications (AT&T) filed the above-captioned transmittal to introduce a "Competitive Response Promotion" whereby AT&T would match the promotional discounts of its competitors if a customer could demonstrate an intention to accept an offer from one of AT&T's competitors. US Sprint Communications Company Limited Partnership filed a petition against this transmittal seeking its rejection or suspension and investigation.[1] For the reasons discussed below, we reject this transmittal as unlawfully discriminatory, pursuant to Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), (the Act).

II. BACKGROUND

2. With Transmittal 3259, AT&T introduces its Competitive Response Promotion under which AT&T would lower its rates to match the promotional rate reductions of a competitor. The transmittal revises certain AT&T tariffs by adding the following provision:

> In order to acquire or retain Customers, AT&T will match certain tariffed promotional offers made by other interexchange carriers where the Customer can demonstrate to AT&T's satisfaction that it intends to accept such offer as an inducement to, or remain subscribed to, a service or services of such other interexchange carrier.

See AT&T Tariff F.C.C. No. 15, Transmittal 3259, Section 14.1.1.F. AT&T says it filed this transmittal because its competitors already have similar promotions in effect. *See* AT&T Transmittal 3259, Cover Letter, dated July 3, 1991.

III. DISCUSSION

3. By establishing a rate reduction that is only available to certain customers, i.e., those customers who are eligible for a competitor's promotion, Transmittal No. 3259 discriminates among AT&T's customers. Thus, the Common Carrier Bureau must determine whether the transmittal is unreasonably discriminatory, in violation of Section 202(a) of the Communications Act. Under Section 202(a) of the Communications Act, discrimination in the provision of "like" services is only prohibited if the discrimination is *unreasonable*. *See* 47 U.S.C. § 202(a). The Commission employs a three-step analysis to determine if a carrier has engaged in unreasonable discrimination. First, the Commission determines whether the services are "like;" second, if the services are like, whether there is a discriminatory price difference; and third, if there is a difference, whether it is reasonable.

4. This transmittal clearly would create a disparity in rates for like services. As AT&T has acknowledged, the benefit offered in Transmittal 3259 is simply, as a result of a promotional reduction, a price break on existing services already described in existing AT&T tariffs. *See e.g.*, AT&T Transmittal No. 3259, Cover Letter dated July 3, 1991. Thus, the remaining issue is whether the price differences established by this promotion discriminate unreasonably and therefore are prohibited by Section 202(a) of the Communications Act.

5. In an Order adopted on August 1, 1991, the Commission rejected an AT&T offering which established a price matching scheme like that in the instant transmittal.[2] In the *Tariff 15 RCI Order*, the Commission found that, when AT&T offers to reduce its rates only to match the rate reductions of its competitors after AT&T's customer communicates the competitor's offer to AT&T, AT&T's offering will have serious potential anticompetitive consequences. The Commission found that the effect of such a price matching practice is to undermine price competition in the interstate, interexchange communications services market. *Tariff 15 RCI Order* at ¶ 14.

6. Transmittal 3259 establishes the same type of price matching mechanism, with the same anti-competitive consequences, as that rejected by the Commission in the *Tariff 15 RCI Order*. Therefore, the Bureau concludes that the discrimination established by the above-captioned transmittal is unreasonable. Accordingly, the Bureau rejects Transmittal 3259 as unlawfully discriminatory in violation of Section 202(a) of the Act.

IV. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that, pursuant to Section 202(a) of the Communications Act of 1934, 47 U.S.C. § 202(a), the tariff revision filed by AT&T Communications in Tariff F.C.C. Nos. 1, 2, and 9, Transmittal No. 3259 IS REJECTED.

8. IT IS FURTHER ORDERED that AT&T Communications SHALL FILE a supplement reflecting this rejection no later than five business days from the release of this Order. Special Permission No. 91-811 is assigned for this purpose.

9. IT IS FURTHER ORDERED that the petition to reject or suspend and investigate AT&T Communications Transmittal No. 3259 filed by US Sprint IS GRANTED to the extent indicated herein and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] US Sprint Petition to Reject or Alternatively Suspend and Investigate, filed July 18, 1991. AT&T filed a reply to this petition on July 25, 1991.

[2] AT&T Communications, Inc., Tariff F.C.C. No. 15, FCC 91-252, Mimeo 38222, released Sept. 16, 1991 (*Tariff 15 RCI Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications — Transmittal Nos. 3214 and 3388

Revisions to Tariff F.C.C. No. 2

ORDER

Adopted: September 27, 1991 Released: September 27, 1991

By the Chief, Common Carrier Bureau:

1. AT&T Communications (AT&T) on June 21, 1991 filed the above-captioned tariff revisions, which provide incentives for 800 service customers who elect to subscribe to a three-year term plan for one or more forms of 800 service.[1] MCI Telecommunications Corporation (MCI) filed a petition to reject or suspend and investigate the tariff, and WATS/800, Inc. (WATS/800) filed a petition to reject.

2. AT&T's 800 Customer Specific Bonus Plan (800 Bonus) offers term plan discounts for the usage component of Domestic 800, READYLINE, MEGACOM 800, 800 Validator, and intrastate READYLINE and MEGACOM 800 services.[2] Customers of these services who commit to generate minimum annual revenues between $5 and $15 million per year for each year of a three-year term qualify for discounts of 22, 23 and 23 percent in the successive years, provided the minimum annual revenue commitment is satisfied. Tariff F.C.C. No. 2, Sec. 3.3.1.P. (page 61.12); Transmittal 3214 Description and Justification (D&J) at 2-3.

3. The 800 Bonus plan establishes two types of credits for the customer. The first provides a credit to the customer's initial monthly bill equal to half a percent of the first year's revenue commitment. The availability of this credit, and the usage rate discounts for specific years during the term, is not limited. Tariff F.C.C. No. 2, Sec. 3.3.1.P. (page 61.12); D&J at 3. The second, more substantial promotional credit is limited, however. For 800 Bonus customers who subscribe prior to October 5, 1991, and order installation by November 30, 1991, AT&T will forgive charges for the most expensive of the customer's first six months of service, up to a maximum of 10 percent of the annual revenue commitment. This second credit is further constrained by a second eligibility limitation: customers may only count revenues from a limited number of locations toward it. Tariff F.C.C. No. 2, Sec. 8.1.1.16 (page 261.22); D&J at 3 n **.[3] Finally, discontinuance of the term plan prior to the term's expiration incurs a charge equal to 30 percent of the remaining revenue commitment. Thus, after the first month of service, depending on the customer's revenue commitment, the discontinuance charge ranges from $4.4 million to $13.1 million. The charge declines to a range of $1.5 million to $4.5 million in the term's last year. Tariff F.C.C. No. 2, Sec. 3.3. 1. P. 5. (page 61.15).

4. AT&T asserts the 800 Bonus plan is projected to increase AT&T's net revenues for services subject to price cap regulation within 36 months of its incorporation into AT&T's annual price cap filing scheduled to become effective July 1, 1992. D&J at 1-2. AT&T attributes the decline in its 800 service demand from higher volume customers (those generating $5 million or more in annual revenues) during the past year to an economic climate that has pressured such customers to reduce costs even at the expense of quality. AT&T describes competition for 800 service as extremely intense, and characterizes its competitors' service offerings as rivaling AT&T's in function and scope. *Id.* at 3-4.

5. MCI argues that Transmittal 3214 is anticompetitive, as it leverages AT&T's dominance in 800 services to forestall the anticipated migratory effects of 800 number portability on AT&T's large customers. According to MCI, the lock-in rate discounts by which this result is sought are enforced by termination provisions more onerous than any previously filed. MCI Petition at 2-3. In light of the Bureau's rejection of an AT&T tariff bundling Software Defined Network (SDN) service with 800 Service,[4] MCI asserts, AT&T cannot be permitted to leverage its present 800 Service dominance into a more competitive future marked by number portability. MCI also contends that AT&T cannot pass a net revenue test for the Bonus 800 offering, as AT&T is simply foregoing revenues from customers who would not leave in any event. *Id.* at 3-5. MCI contends that AT&T's market power is beyond dispute, citing the separate basket established for 800 services in the *AT&T Price Cap Order*,[5] and statements in the Notice of Proposed Rulemaking in the *Interexchange Competition* proceeding.[6] *Id.* at 5-8.

6. WATS/800 contends that Transmittal 3214 limits the availability of 800 Bonus, in that it fails to specify whether AT&T will provide customers with the services of AT&T account teams. WATS/800 states that the continued presence of such responsive support personnel, who are compensated on a commission rather than salaried basis, is viewed by larger customers as essential to maintaining their present level of service and keeping apprised of AT&T ratemaking initiatives. According to WATS/800,

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[1] On August 20, 1991, AT&T filed Transmittal 3388 to revise its earlier transmittal. Transmittal 3388 revised the customer's responsibility for payment and promotional provisions specified in the original transmittal.

[2] Although styled as a "customer specific" plan, the offering is general in terms, not a Tariff 15-type arrangement structured for individual customers.

[3] This limit varies with the customer's revenue commitment. For the largest revenue commitment, between $13 and $15 million per year, the customer is limited to nine locations in order to receive the credit. This limitation expires after the first year of the term plan.

[4] AT&T Communications, Transmittals 2071 and 2212, Order, 5 FCC Rcd 3833 (1990) *app'n for review pending* (*SDN/800 Rejection Order*).

[5] Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 2873, 3053 (1989) (*AT&T Price Cap Order*).

[6] Competition in the Interstate Interexchange Marketplace, Notice of Proposed Rulemaking, 5 FCC Rcd 2627, 2635-36 (1989) (*Interexchange Competition NPRM*); Final Order, FCC 91-251, Sept. 16, 1991 (*Interexchange Competition Final Order*).

the tariff's silence enables AT&T to provide or withhold that support on an arbitrary basis. WATS/800 Petition at 1-3.

7. AT&T replies that MCI's claims of leveraging are unsupported by proof of market power and the abuse of that power, which AT&T asserts are required under relevant antitrust precedent; and in any case, AT&T argues, this offering affects only one service. AT&T further contends that the absence of number portability provides no carrier with a competitive advantage, and the "lock in" complained of by MCI is entirely voluntary -- it is not a condition of receiving 800 Service. Nor is there any requirement that AT&T receive a particular portion of a customer's 800 service traffic, AT&T notes. AT&T Reply at 3-5. AT&T then asserts that its imposition of termination charges is consistent with competitors' term plans and warranted by the significant up-front costs AT&T incurs to serve qualifying customers. Finally, AT&T states that assignment of account teams as part of AT&T's marketing effort is done without charge to the customer, and thus is not a charge for service that must be tariffed. *Id.* at 5-6.

8. The Common Carrier Bureau has reviewed AT&T transmittals 3214 and 3388, the petitions and AT&T's reply, and supplemental submissions. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection, or that an investigation is warranted at this time.

9. Therefore, IT IS ORDERED that the petition to reject or alternatively, to suspend and investigate AT&T Communications Tariff F.C.C. No. 2, Transmittal 3214, filed by MCI Telecommunications Corporation, and the petition to reject Transmittal 3214, filed by WATS/800, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: September 27, 1991

COMMENTS INVITED ON UTAH PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for Utah (Region 41).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, interested parties may file comments on or before **November 6, 1991** and reply comments on or before **November 21, 1991.** (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **PR Docket 91-282 Utah-Public Safety Region 41.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 80-286
CC Docket No. 78-72

In the Matter of

Amendment of Part 36
of the Commission's Rules
and Establishment of a
Joint Board

MTS and WATS Market Structure

ORDER

Adopted: September 27, 1991; Released: October 2, 1991

By the Commission:

1. On August 6, 1991, the National Association of Regulatory Utility Commissioners, pursuant to section 410(c) of the Communications Act, [1] nominated Lilo K. Schifter, Commissioner, Maryland Public Service Commission, to serve on the Joint Board in CC Docket No. 80-286. [2] Commissioner Schifter would fill the vacancy on the Joint Board resulting from the departure of Commissioner George H. Barbour of the New Jersey Board of Public Utilities.

2. Pursuant to Section 410(c) of the Communications Act, we hereby appoint Commissioner Schifter to serve on the Joint Board established in CC Docket No. 80-286. Henceforth a copy of all filings in this proceeding shall be served on Commissioner Schifter at the following address:

The Honorable Lilo K. Schifter
Commissioner
Maryland Public Service Commission
American Building
231 East Baltimore Street
Baltimore, Maryland 21202-3486
Telephone (301) 333-6073

3. ACCORDINGLY, IT IS ORDERED that the Honorable Lilo K. Schifter shall serve as a state member of the Joint Board in CC Docket No. 80-286.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[1] 47 U.S.C. § 410(c) (1985).
[2] Letter from Paul Rodgers, General Counsel, National Association of Regulatory Utility Commissioners, to Alfred C. Sikes, Chairman, Federal Communications Commission, dated August 6, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Correction of Parts 73 and 76 of
the Commission's Rules

ORDER

Adopted: September 26, 1991 Released: September 27, 1991

By the Chief, Mass Media Bureau:

1. This *Order* amends the Commission's Rules to correct minor editorial errors in Title 47 of the Code of Federal Regulations. Specifically, the Commission makes changes to 47 CFR Parts 73 and 76. This *Order* makes no substantive changes that impose additional burdens or remove provisions relied upon by licensees or the public. For this reason, we believe that this revision will serve the public interest. This information is corrected as part of the Agency's oversight function.

2. This amendment is implemented by authority delegated by the Commission to the Chief, Mass Media Bureau. Because this amendment only interprets and clarifies the existing language of Parts 73 and 76, prior notice of rule making is not required. 47 CFR Section 1.412(c). For this same reason, this amendment may become effective upon publication in the *Federal Register*. 47 CFR Section 1.427(b). Because a general notice of proposed rule making is not required, the Regulatory Flexibility Act does not apply.

3. Therefore, IT IS ORDERED, That pursuant to Sections 4, 5, and 303, of the Communications Act of 1934, as amended, and Sections 0.61 and 0.283 of the Commission's Rules, Parts 73 and 76 of the FCC Rules and Regulations ARE AMENDED as set forth below, effective upon publication in the *Federal Register*.

4. For further information on this *Order*, call Rita S. McDonald, Policy and Rules Division at (202) 632-5414.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

APPENDIX

47 CFR Parts 73 and 76 are amended as follows:

1. The authority citation for Parts 73 and 76 continues to read as follows:

Authority: 47 U.S.C. Sections 154 and 303.

2. The Table of allotments in Section 73.606(b) is revised by correcting the spelling of "Grosnell" to read "Gosnell" under the Arkansas heading, by removing the listing for Sikeston from Montana and adding it under Missouri, and by adding Channels 2-, 48-, and 61 at Greensboro under the North Carolina heading.

3. Section 73.614 is amended by revising the first formula in paragraph (b)(1) to read as follows:

Section 73.614 Power and antenna height requirements.

* * * * *

(b) * * *

(1) Channels 2-6 in Zone I:

$$ERP_{Max} = 102.57\text{-}33.24 * Log_{10}(HAAT)$$

* * *

* * * * *

4. Section 73.667 is amended by revising the last sentence in paragraph (a) to read as follows:

Section 73.667 TV subsidiary communications services.

(a)* * *Subsidiary communications include, but are not limited to, services such as functional music, specialized foreign language programs, radio reading services, utility load management, market and financial data and news, paging and calling, traffic control signal switching, and point-to-point or multipoint messages.

* * * * *

5. The third sentence of the definition of Effective radiated power in Section 73.681 is revised by lower casing the "k" in the phrase "kW."

6. Section 76.53 is amended by correcting the following latitudes and longitudes: the latitude for Mount Cheaha State park, Alabama is corrected from $32^{0}29'06"$ to $33^{0}29'06"$; the longitude for Richmond, Indiana is corrected from $86^{0}53'26"$ to $84^{0}53'26"$; the latitude for Elizabethtown, Kentucky is corrected from $38^{0}41'38"$ to $37^{0}41'38"$; and the latitude for Windsor, Vermont is corrected from $44^{0}28'38"$ to $43^{0}28'38"$.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Commission Requirements
for Cost Support Material
To Be Filed with Open Network
Architecture Access Tariffs

ORDER

Adopted: September 19, 1991 Released: September 19, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. This Order sets forth certain requirements for summary cost support material that the Bell Operating Companies[1] (BOCs) must file to support their open network architecture (ONA) access charge tariff filings on or before November 1, 1991 in partial fulfillment of the requirements established in the *ONA Order*.[2] Specific data formats are detailed in the Tariff Review Plan (TRP), and are appended to this Order. The TRPs display basic cost, demand, and rate information in a manner that is consistent for all BOCs, thereby aiding review by the Commission and interested parties of the BOCs' required ONA access tariff filings.

A. Background

2. The *ONA Order* detailed several items of cost support which the BOCs must file in support of their ONA tariff filings. Specifically, it said companies must

> a) provide engineering studies, time and wage studies, or other cost accounting studies to identify direct costs, absent overheads, including costs for a representative 12-month period, demand and revenue changes including cross elastic effects, and supporting workpapers;[3]
>
> b) perform a net revenue test;[4]
>
> c) make an on-the-record showing for any claimed risk premium, including research-and-development expense and investment, marketing expense, the type and function of new technologies used, an explanation of the method used to project demand, and an explanation of any special elements of risk;[5]
>
> d) compute the ratios of direct unit cost to unit investment and direct unit cost to unit price for each service;[6]
>
> e) indicate which basic service elements (BSEs) the BOC projects it will use before the BSEs are incorporated in the price cap indexes;[7] and
>
> f) demonstrate that unbundling the feature groups is revenue neutral by recasting the base period demand for the bundled feature groups into basic servicing arrangements (BSAs) and BSEs, and demonstrating that the unbundled BSA/BSE rates multiplied by the recast historical demand are less than or equal to the bundled feature group rates times the historical demand.[8]

The TRP we are adopting in this Order provides a uniform computerized format for the provision of this data.

B. Requirements

3. The BOCs are required to provide their engineering or other cost accounting studies in support of their filings. We believe that, in order to properly assess the reasonableness of the ONA rates, we and the intervenors will need complete documentation of these studies. We therefore require all BOCs to file on the public record, along with their TRPs, documented versions of all engineering or cost accounting studies used in the development of their ONA rates.[9]

4. We wish to clarify how the LS1/LS2/Non-Premium rate structure for switching rates must be reflected in the BSAs. The LS1 rate is currently set at 96 percent of the LS2 rate,[10] and the Non-Premium rate is set at 45 percent of the LS2 rate. The *ONA Order* required carriers to create one lineside and one trunkside BSA that correspond to the feature groups, but made no changes to the discounts required for the LS1/LS2/Non-Premium rates.

5. For purposes of calculating the LS1/LS2/Non-Premium rates, the lineside BSA is comparable to Feature Group A, which currently pays either the Non-Premium rate, in an office which is not converted to equal access, or the LS1 rate, in an office which is converted to equal access. Feature Groups C and D are

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[1] The Bell Operating Companies are the operating companies of Ameritech Operating Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Corporation (BellSouth), New York Telephone Company and New England Telephone and Telegraph Company (NYNEX), Pacific Bell and Nevada Bell (Pactel), Southwestern Bell Telephone Company (SWB), and US West Communications (US West).

[2] *See* Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture and Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking, CC Docket Nos. 89-79 and 87-313, FCC 91-186, released July 11, 1991 (*ONA Order*), *petitions for reconsiderationand clarification pending.*

[3] *Id.* at para. 42.

[4] *Id.*

[5] *Id.* at para. 44.

[6] *Id.*

[7] *Id.* at para. 45.

[8] *Id.* at para. 48.

[9] It is our understanding that most BOCs plan to use the Switching Cost Information System (SCIS) to develop their unit investment estimates. Those BOCs which do use it must file the model on the public record. Any other model a BOC uses must also be filed on the public record. In addition, the BOCs must give a complete written description of SCIS or other models they use, describing in full the inputs, algorithms, and outputs of the model.

[10] On July 1, 1992, the LS1 rate will be set at 99.5 percent of the LS2 rate. After June 30, 1993, the LS1 rate and the LS2 rate will be equivalent.

comparable to the trunkside BSA and currently pay the LS2 rate. Feature Group B is also comparable to a trunkside BSA, but pays either the LS1 rate, in an office converted to equal access, or the Non-Premium rate, in an office not converted to equal access. Thus, the feature group comparable to the lineside BSA currently pays either the LS1 or the Non-Premium rate, and the feature groups comparable to the trunkside BSA curently pay either the LS2, LS1, or the Non-Premium rate.

6. Compliance with the applicable rules therefore requires that there be two rate levels for the lineside BSA and three rate levels for the trunkside BSA.[11] The three rate levels for the trunkside BSA should reflect the LS2/LS1/Non-Premium discount structure. The two rate levels for the lineside BSA should reflect the LS1/Non-Premium discount structure. The trunkside LS1 BSA rate should be equivalent to the lineside LS1 BSA rate. Similarly, the trunkside Non-Premium local switching component of the BSA rate should be equivalent to the lineside Non-Premium local switching component of the BSA rate. The BOCs should demonstrate revenue neutrality for the entire set of BSAs and BSEs which are being unbundled from the feature groups, rather than separately for each of the LS2-, LS1-, and NonPremium-comparable BSAs.

II. ONA TARIFF REVIEW PLAN

7. In the following paragraphs, we discuss the purposes of the ONA TRP charts. Attachment A of this Order provides the charts for the ONA TRP.

A. Chart UNIT

8. This chart presents, for each BSE, the direct unit costs and unit investments for each BSE. The unit investments are displayed by category of investment. This detail is necessary to enable us to determine what type of equipment is being used for provision of ONA services. Companies should provide the data requested in this chart for all their BSEs, using one column per BSE.

B. Chart RATIO

9. This chart displays, for each BSE, the ratios of direct unit cost to direct unit investment and direct unit cost to the unit prices, as required by the *ONA Order*.

C. Chart NEUT-1

10. This chart demonstrates revenue neutrality of the BSA/BSE rates. It displays the historical demand and the rates for the bundled feature groups, and computes the revenue from that data. It also displays the historical demand recast into the BSAs and BSEs, the BSA and BSE rates, and the revenue computed from that data. The revenue computed in this way from the proposed BSA and BSE rates should be less than or equal to the revenue computed in this way from the bundled feature group rates. Revenue neutrality for the non-recurring charges is computed separately and documented in chart NEUT-2.

11. To recast historical demand, companies should determine which BSAs and BSEs are functionally equivalent to the feature groups. The historical feature group demand should then, in general, be mapped directly to the BSAs and BSEs. If the companies believe that not all BSEs which provide functional equivalence will be purchased, they may reflect that in their recast historical demand. However, if they do so, they must document in the Description and Justification section of their filings the changes in historical demand they expect. Specifically, the companies must provide the recast historical demand which gives full functional equivalence, list which BSEs and how many units of the BSEs will not be purchased, list which of their exiting customers will not purchase the BSEs, and describe the method by which the company determined the BSEs would not be purchased.

D. Chart NEUT-2

12. This chart demonstrates revenue neutrality of the non-recurring charges (NRCs). It displays the historical demand and the rates for the NRCs under the bundled feature groups, and computes the revenue from that data. It also displays the historical demand recast into the NRCs under the BSAs and BSEs, the proposed rates, and the revenue computed from that data. We do not expect that new NRCs associated with the unbundled BSEs will be required. This chart should reflect only those NRCs which existed under the Feature Groups.

E. Chart NETREV

13. This chart displays the net revenue test. It provides the demand, revenue, and expenses for the new unbundled BSA and BSEs, and the foregone demand, revenue, and expenses for the bundled feature groups.

14. As required for chart NEUT-1, carriers should in general simply recast their projected feature group demand into the functionaly equivalent BSAs and BSEs. To the extent a carrier believes that not all BSEs which provide functional equivalence will be purchased, it may adjust its demand, but must provide the same documentation for that adjustment as it did for the adjustment in chart NEUT-1.

F. Chart FLAG

15. This chart lists all BSEs, and indicates whether they are projected to be purchased by a BOC-affiliated enhanced service provider (ESP) before the BSAs and BSEs are incorporated in the price cap indexes.

III. GENERAL INSTRUCTIONS

16. The following general instructions apply to all BOCs filing ONA tariffs.

A. Additional Requirements

17. Some BOCs have filed, under the expedited approval process, BSEs which are not currently listed in their ONA plans. The BOCs which have done so are required to include in a separate section of their Description and Justification a list of all such BSEs that are approved and included in the November 1 tariff. The list shall be composed of the following information: (1) a citation to the letter requesting the approval; (2) a statement that the 45-day review cycle has been completed; and (3) a description of the BSE.

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[11] The BSEs will all be priced the same, *i.e.*, there will be no LS2/LS1/Non-Premium structure for the BSEs.

18. We also understand that some BOCs may not be introducing some BSEs which are currently in their approved ONA plans. These BOCs must provide, in a separate section of their Description and Justification, a list of all such BSEs, along with an explanation of why these BSEs are not being introduced at this time.

19. We also require the BOCs to provide a list of all BSEs they are introducing which identifies the generic equivalent name for each of those BSEs from Bellcore's ONA Services User Guide, dated July 31, 1991. If a BSE has no exact equivalent in that list, the BOC should identify the BSE from Bellcore's list which is most closely related to the BOC's BSE, and explain the differences.

B. Errata

20. As we have noted in the past, the submission of incorrect cost support data and the subsequent filing of errata seriously detract from the ability of the Commission and interested parties to evaluate the rates within the notice period. In previous annual access filings, we required that any erratum be accompanied by a request for special permission to permit the transmittal to take effect on the originally scheduled effective date. Further, we required that, if such a request were refused, rates supported by the erratum must be refiled upon adequate notice, regardless of whether these rates differ from the rates as originally filed. We believe that the special permission requirement is a reasonable means of ensuring the quality of data submitted in the ONA access filings. We also believe it facilitates the tariff review process.

21. We therefore require that carriers file a request for special permission with any erratum that is filed to correct errors or otherwise revise their ONA access tariff support data. If such a request is refused, the carrier must refile the rates that are supported by the erratum, regardless of whether these rates differ from the rates as originally filed. These requirements pertain to all data filed in support of access charges, including all data that are required by the TRP. All TRP data must be filed no later than November 1, 1991, and must be accurate and complete.

22. As in the annual access tariff filings, we may specify an early cut-off date for errata if it appears there will be a significant number of errata filings. Carriers who discover errors after the cut-off date may be required to refile their tariffs with a later effective date. We also remind carriers, however, that they are under a legal obligation to correct any erroneous data discovered in the TRP or other cost support data.

C. Certification

23. As in annual access tariff filings, the BOCs must certify the accuracy of the data that are submitted in support of rates by including a signed statement that the support data is true, correct, and complete. Certification is required for all data submitted in support of ONA rates, including all data that are required by the TRP. The text of the certification is the same as that adopted in the *1987 Waiver Order*[12] and the *1988 TRP Order*. The certification should be displayed as the last page in the binder containing each company's TRP.

D. Waivers

24. If carriers find that they are unable to provide data required by the TRP, they may file applications for waiver. These waiver applications must demonstrate good cause for reporting a different or lower level of detail and must indicate how these deficiencies will be corrected. Carriers are strongly encouraged to comply with the requirements. Omission of individual data items or entries, without request for waiver, is unacceptable. If a carrier determines, however, that it will be unable to meet these requirements, it must file an application for waiver with the Commission no later than September 27, 1991. Oppositions to applications for waiver shall be filed not later than October 4, 1991. Each carrier requesting any waiver of the requirements of this Order or of any other Commission Rule or Order applicable to this ONA access tariff filing shall include all such requests in this single application. Carriers should not delay undertaking development of data required by the ONA TRP in anticipation that waiver requests will be granted.

E. Technical Requirements

25. All charts must be filed in both paper copy and computerized format. The computerized charts must be filed in LOTUS 1-2-3, Version 3.1. Spreadsheet formats for the computerized filings will be available from the Tariff Division.

F. Compliance with the Paperwork Reduction Act

26. Because there are only nine BOC entities required to file this TRP, there is no Paperwork Reduction Act effect of this filing. We note, however, that the TRP was developed after several informal discussions with the BOCs and other interested parties.

IV. CONCLUSION; PROCEDURAL REQUIREMENTS

27. This Order will be sent directly to all carriers that will file their own ONA access tariffs on November 1, 1991. A copy of the Order and all attachments will be available for inspection at the Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. While the Commission will distribute copies of the main text of this Order, those parties wishing to obtain copies of Attachment A can do so only through the Commission's contractor for public records duplication.

28. Each company should submit its TRP separately from other portions of its tariff filing. Each TRP should be filed in a separate Volume 1-2 accompanying Volume 1 of the Description andJustification. The Bureau will provide further details regarding the procedures applicable to the November 1 tariff filing in a future release.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

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[12] *See* Annual 1987 Access Tariff Filings, Petitions for Waivers of Filing Requirements, Memorandum Opinion and Order, Mimeo No. 6945, released Sept. 16, 1986 (*1987 Waiver Order*).

ATTACHMENT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DA 91-1169

In the Matter of	)
	)
Commission Requirements	)
for Cost Support Material	)
To Be Filed with Open Network	)
Architecture Access Tariffs	)

Direct Unit Investment and Direct Unit Costs For Unbundled Lineside and Trunkside BSEs

	A Alternate Routing Projected 12 months	B Answer Supervision W/Line Side Interface Projected 12 months	C Automatic Protection Switching Projected 12 months	D Bridging Projected 12 months	E Call Denial Projected 12 months	F Call Detail Recording Reports Projected 12 months
DIRECT UNIT COSTS						
1 Depreciation						
2 Return on Investment						
3 Taxes						
4 Maintenance						
5 Administration						
6 Other						
7 Total Direct Recurring Costs						
INDIRECT UNIT COSTS						
8 Overhead Loadings						
9 Total Direct and						
Indirect Unit Costs						
UNIT INVESTMENT						
10 COE Switching						
11 COE Transmission						
12 Cable and Wire						
13 Information						
14 Amortizable Assets						
15 Total Unit Investment						

Notes: Line 3 "taxes" should include only federal, state and local income taxes. Include all other taxes on line 6.

Direct Unit Investment and Direct Unit Costs For Unbundled Lineside and Trunkside BSEs

G Called Directory Number Delivery via 900NXX Projected 12 months	H Called Directory Number Delivery via DID Projected 12 months	I Called Directory Delivery via ICLID Projected 12 months	J Calling Billing Number Delivery Projected 12 months	K Carrier Selection on Reverse Charge Multiline Hunt Group Projected 12 months	L Conditioning Projected 12 months	M DID Trunk Queing Projected 12 months	N Fast Select Acceptance Projected 12 months

5687

Notes: Line 3 "taxes" should include only federal, state and local income taxes. Include all other taxes on line 6.

Direct Unit Investment and Direct Unit Costs For Unbundled Lineside and Trunkside BSEs

O Faster Signalling on DID Projected 12 months	P Flexible ANI Information Digits Projected 12 months	Q Line Monitor Service Projected 12 months	R Make Busy Key Projected 12 months	S Message Desk (SDMI) Projected 12 months	T Message Desk (SMDI) Expanded Projected 12 months	U Message Waiting Indicator – Activation (Audible) Projected 12 months	V Message Waiting Indicator – Expanded Projected 12 months

5688

Notes: Line 3 "taxes" should include only federal, state and local income taxes. Include all other taxes on line 6.

Direct Unit Investment and Direct Unit Costs For Unbundled Lineside and Trunkside BSEs

W Multiline Hunt Group Projected 12 months	X Multiline Hunt Group Circular Projected 12 months	Y Multiline Hunt Group CO Announcement Projected 12 months	Z Multiline Hunt Group Individual Access to Each Port Projected 12 months	AA Multiline Hunt Group Overflow Projected 12 months	AB Multiline Hunt Group Preferred Projected 12 months	AC Multiline Hunt Group UCD with Queing Projected 12 months	AD Multiline Hunt Group Uniform Call Dist Line Hunting Projected 12 months

5689

Notes: Line 3 "taxes" should include only federal, state and local income taxes. Include all other taxes on line 6.

Direct Unit Investment and Direct Unit Costs
For Unbundled Lineside and Trunkside BSEs

AE Network Reconfiguration	AF Reverse Charge Acceptance	AG RPOA Preselection	AH Secondary Channel Capability	AI Service Code Denial	AJ Statistical Multiplexer	AK Tandem Routing	AL Three Way Call Transfer
Projected 12 months	Projected 12 months	Projected 12 months	Projected 12 months	Projected 12 months	Projected 12 months	Projected 12 months	Projected 12 months

5960

Notes: Line 3 "taxes" should include only federal, state and local income taxes. Include all other taxes on line 6.

Chart UNIT

Direct Unit Investment and Direct Unit Costs
For Unbundled Lineside and Trunkside BSEs

AM Three Way Calling Projected 12 months	AN Uniform Seven–Digit Access Number Remote Call Forwarding Projected 12 months	AO 800 Service to DID Projected 12 months	AP Other BSE Projected 12 months	AQ Other BSE Projected 12 months	AR Other BSE Projected 12 months	AS Other BSE Projected 12 months	AT Other BSE Projected 12 months

5691

Notes: Line 3 "taxes" should include only federal, state and local income taxes. Include all other taxes on line 6.

Chart RATIO

Ratio of Direct Unit Cost to Unit Investment and Direct Unit Cost to Rate For Unbundled Lineside and Trunkside BSEs:

	A Alternate Routing	B Answer Supervision W/Line Side Interface	C Automatic Protection Switching	D Bridging	E Call Denial
Ratios					
1 Direct Annual Recurring Costs (DC)					
2 Total Unit Investment (DI)					
3 Annual Rate					
4 Ratio of DC/DI					
5 Ratio of DC/Rate					

5692

Notes:
- Direct Annual Recurring Costs from appropriate column in Chart UNIT, Line 7.
- Total Unit Investment from appropriate column in Chart UNIT, Line 15.

Ratio of Direct Unit Cost to Unit Investment and Direct Unit Cost to Rate For Unbundled Lineside and Trunkside BSEs:

F Call Detail Recording Reports	G Called Directory Number Delivery VIA 900nxx	H Called Directory Number Delivery via DID	I Called Directory Delivery via ICLID	J Calling Billing Number Delivery	K Carrier Selection on Reverse Charge Multiline Hunt Group	L Conditioning

Notes:
- Direct Annual Recurring Costs from appropriate column in Chart UNIT, Line 7.
- Total Unit Investment from appropriate column in Chart UNIT, Line 15.

Ratio of Direct Unit Cost to Unit Investment and Direct Unit Cost to Rate For Unbundled Lineside and Trunkside BSEs:

M DID Trunk Queing	N Fast Select Acceptance	O Faster Signalling on DID	P Flexible ANI Information Digits	Q Line Monitor Service	R Make Busy Key	S Message Desk (SDMI)

5694

Notes:
- Direct Annual Recurring Costs from appropriate column in Chart UNIT, Line 7.
- Total Unit Investment from appropriate column in Chart UNIT, Line 15.

Ratio of Direct Unit Cost to Unit Investment and Direct Unit Cost to Rate For Unbundled Lineside and Trunkside BSEs:

T Message Desk (SMDI) Expanded	U Message Waiting Indicator – Activation	V Message Waiting Indicator – Expanded (Audible)	W Multiline Hunt Group	X Multiline Hunt Group Circular	Y Multiline Hunt Group CO Announcement	Z Multiline Hunt Group Individual Access to Each Port

5695

Notes:
- Direct Annual Recurring Costs from appropriate column in Chart UNIT, Line 7.
- Total Unit Investment from appropriate column in Chart UNIT, Line 15.

Ratio of Direct Unit Cost to Unit Investment and Direct Unit Cost to Rate For Unbundled Lineside and Trunkside BSEs:

AA Multiline Hunt Group Overflow	AB Multiline Hunt Group Preferred	AC Multiline Hunt Group UCD with Queing	AD Multiline Hunt Group Uniform Call Dist Line Hunting	AE Network Reconfiguration	AF Reverse Charge Acceptance	AG RPOA Preselection

Notes:
- Direct Annual Recurring Costs from appropriate column in Chart UNIT, Line 7.
- Total Unit Investment from appropriate column in Chart UNIT, Line 15.

Ratio of Direct Unit Cost to Unit Investment and Direct Unit Cost to Rate For Unbundled Lineside and Trunkside BSEs:

AH Secondary Channel Capability	AI Service Code Denial	AJ Statistical Multiplexer	AK Tandem Routing	AL Three Way Call Transfer	AM Three Way Calling	AN Uniform Seven–Digit Access Number Remote Call Forwarding

Notes:
- Direct Annual Recurring Costs from appropriate column in Chart UNIT, Line 7.
- Total Unit Investment from appropriate column in Chart UNIT, Line 15.

Ratio of Direct Unit Cost to Unit Investment and Direct Unit Cost to Rate For Unbundled Lineside and Trunkside BSEs:

AO 800 Service to DID	AP Other BSE	AQ Other BSE	AR Other BSE	AS Other BSE	AT Other BSE	AU Other BSE

Notes:
- Direct Annual Recurring Costs from appropriate column in Chart UNIT, Line 7.
- Total Unit Investment from appropriate column in Chart UNIT, Line 15.

Chart NEUT-1

Demonstration of Revenue Neutrality
Recurring Costs

Carrier Name/ONA Name	A Base 12 Month Demand Current	B Base 12 Month Demand Proposed	C Current Rates	D Proposed Rates	E Revenue at Current Rates (A*C)	F Revenue at Proposed Rates (B*D)
1 LS2		NA		NA		NA
2 LS1		NA		NA		NA
3 Non Premium		NA		NA		NA
4 LS2 Trunkside BSA	NA		NA		NA	
5 LS1 Trunkside BSA	NA		NA		NA	
6 Non Premium Trunkside BSA	NA		NA		NA	
7 LS1 Lineside BSA	NA		NA		NA	
8 Non Premium Lineside BSA	NA		NA		NA	
9 Alternate Routing	NA		NA		NA	
10 Answer Supervision With a Line Side Interface	NA		NA		NA	
11 Automatic Protection Switching	NA		NA		NA	
12 Bridging	NA		NA		NA	
13 Call Denial	NA		NA		NA	
14 Call Detail Recording Reports	NA		NA		NA	
15 Called Directory Number Delivery via 900NXX	NA		NA		NA	
16 Called Directory Number Delivery via DID	NA		NA		NA	
17 Called Directory Number Delivery via ICLID	NA		NA		NA	
18 Calling Billing Number Delivery	NA		NA		NA	
19 Carrier Selection on Reverse Charge Multiline Hunt Group	NA		NA		NA	
20 Conditioning	NA		NA		NA	
21 DID Trunk Queing	NA		NA		NA	
22 Fast Select Acceptance	NA		NA		NA	
23 Faster Signalling on DID	NA		NA		NA	
24 Flexible ANI Information Digits	NA		NA		NA	
25 Line Monitor Service	NA		NA		NA	
26 Make Busy Key	NA		NA		NA	
27 Message Desk (SDMI)	NA		NA		NA	
28 Message Desk (SMDI) – Expanded	NA		NA		NA	
29 Message Waiting Indicator – Activation (Audible)	NA		NA		NA	
30 Message Waiting Indicator – Expanded	NA		NA		NA	
31 Multiline Hunt Group	NA		NA		NA	
32 Multiline Hunt Group – Circular	NA		NA		NA	
33 Multiline Hunt Group – C.O. Announcement	NA		NA		NA	
34 Multiline Hunt Group – Individual Access to Each Port	NA		NA		NA	
35 Multiline Hunt Group – Overflow	NA		NA		NA	
36 Multiline Hunt Group – Preferred	NA		NA		NA	
37 Multiline Hunt Group – UCD with queing	NA		NA		NA	
38 Multiline Hunt Group – Uniform Call Distribution Line Hunting	NA		NA		NA	
39 Network Reconfiguration	NA		NA		NA	
40 Reverse Charge Acceptance	NA		NA		NA	
41 RPOA Preselection	NA		NA		NA	
42 Secondary Channel Capability	NA		NA		NA	
43 Service Code Denial	NA		NA		NA	
44 Statistical Multiplexer	NA		NA		NA	
45 Tandem Routing	NA		NA		NA	
46 Three Way Call Transfer	NA		NA		NA	
47 Three Way Calling	NA		NA		NA	
48 Uniform Seven-Digit Access Number – Remote Call Forwarding	NA		NA		NA	
49 800 Service to DID	NA		NA		NA	
50 Other BSE	NA		NA		NA	
51 Other BSE	NA		NA		NA	
52 Other BSE	NA		NA		NA	
53 Other BSE	NA		NA		NA	
54 Other BSE	NA		NA		NA	
55 Other BSE	NA		NA		NA	
Total:						

Demonstration of Revenue Neutrality
Non-Recurring Costs

Carrier Name/ONA Name	A Base 12 Month Demand Current	B Base 12 Month Demand Proposed	C Current Rates	D Proposed Rates	E Revenue at Current Rates (A*C)	F Revenue at Proposed Rates (B*D)
1 LS2		NA		NA		NA
2 LS1		NA		NA		NA
3 Non Premium		NA		NA		NA
4 LS2 Trunkside BSA	NA		NA		NA	
5 LS1 Trunkside BSA	NA		NA		NA	
6 Non Premium Trunkside BSA	NA		NA		NA	
7 LS1 Lineside BSA	NA		NA		NA	
8 Non Premium Lineside BSA	NA		NA		NA	
9 Alternate Routing	NA		NA		NA	
10 Answer Supervision With a Line Side Interface	NA		NA		NA	
11 Automatic Protection Switching	NA		NA		NA	
12 Bridging	NA		NA		NA	
13 Call Denial	NA		NA		NA	
14 Call Detail Recording Reports	NA		NA		NA	
15 Called Directory Number Delivery via 900NXX	NA		NA		NA	
16 Called Directory Number Delivery via DID	NA		NA		NA	
17 Called Directory Number Delivery via ICLID	NA		NA		NA	
18 Calling Billing Number Delivery	NA		NA		NA	
19 Carrier Selection on Reverse Charge Multiline Hunt Group	NA		NA		NA	
20 Conditioning	NA		NA		NA	
21 DID Trunk Queing	NA		NA		NA	
22 Fast Select Acceptance	NA		NA		NA	
23 Faster Signalling on DID	NA		NA		NA	
24 Flexible ANI Information Digits	NA		NA		NA	
25 Line Monitor Service	NA		NA		NA	
26 Make Busy Key	NA		NA		NA	
27 Message Desk (SDMI)	NA		NA		NA	
28 Message Desk (SMDI) - Expanded	NA		NA		NA	
29 Message Waiting Indicator - Activation (Audible)	NA		NA		NA	
30 Message Waiting Indicator - Expanded	NA		NA		NA	
31 Multiline Hunt Group	NA		NA		NA	
32 Multiline Hunt Group - Circular	NA		NA		NA	
33 Multiline Hunt Group - C.O. Announcement	NA		NA		NA	
34 Multiline Hunt Group - Individual Access to Each Port	NA		NA		NA	
35 Multiline Hunt Group - Overflow	NA		NA		NA	
36 Multiline Hunt Group - Preferred	NA		NA		NA	
37 Multiline Hunt Group - UCD with queing	NA		NA		NA	
38 Multiline Hunt Group - Uniform Call Distribution Line Hunting	NA		NA		NA	
39 Network Reconfiguration	NA		NA		NA	
40 Reverse Charge Acceptance	NA		NA		NA	
41 RPOA Preselection	NA		NA		NA	
42 Secondary Channel Capability	NA		NA		NA	
43 Service Code Denial	NA		NA		NA	
44 Statistical Multiplexer	NA		NA		NA	
45 Tandem Routing	NA		NA		NA	
46 Three Way Call Transfer	NA		NA		NA	
47 Three Way Calling	NA		NA		NA	
48 Uniform Seven-Digit Access Number - Remote Call Forwarding	NA		NA		NA	
49 800 Service to DID	NA		NA		NA	
50 Other BSE	NA		NA		NA	
51 Other BSE	NA		NA		NA	
52 Other BSE	NA		NA		NA	
53 Other BSE	NA		NA		NA	
54 Other BSE	NA		NA		NA	
55 Other BSE	NA		NA		NA	
Total:						

NET REVENUE TEST

BSAs AND BSEs	A DEMAND	B REVENUES	C EXPENSES	D NET REVENUE
1 LS2				NA
2 LS1				NA
3 Non Premium				NA
4 LS2 Trunkside BSA				NA
5 LS1 Trunkside BSA				NA
6 Non Premium Trunkside BSA				NA
7 LS1 Lineside BSA				NA
8 Non Premium Lineside BSA				NA
9 Alternate Routing				NA
10 Answer Supervision With a Line Side Interface				NA
11 Automatic Protection Switching				NA
12 Bridging				NA
13 Call Denial				NA
14 Call Detail Recording Reports				NA
15 Called Directory Number Delivery via 900NXX				NA
16 Called Directory Number Delivery via DID				NA
17 Called Directory Number Delivery via ICLID				NA
18 Calling Billing Number Delivery				NA
19 Carrier Selection on Reverse Charge Multiline Hunt Group				NA
20 Conditioning				NA
21 DID Trunk Queing				NA
22 Fast Select Acceptance				NA
23 Faster Signalling on DID				NA
24 Flexible ANI Information Digits				NA
25 Line Monitor Service				NA
26 Make Busy Key				NA
27 Message Desk (SDMI)				NA
28 Message Desk (SMDI) – Expanded				NA
29 Message Waiting Indicator – Activation (Audible)				NA
30 Message Waiting Indicator – Expanded				NA
31 Multiline Hunt Group				NA
32 Multiline Hunt Group – Circular				NA
33 Multiline Hunt Group – C.O. Announcement				NA
34 Multiline Hunt Group – Individual Access to Each Port				NA
35 Multiline Hunt Group – Overflow				NA
36 Multiline Hunt Group – Preferred				NA
37 Multiline Hunt Group – UCD with queing				NA
38 Multiline Hunt Group – Uniform Call Distribution Line Hunting				NA
39 Network Reconfiguration				NA
40 Reverse Charge Acceptance				NA
41 RPOA Preselection				NA
42 Secondary Channel Capability				NA
43 Service Code Denial				NA
44 Statistical Multiplexer				NA
45 Tandem Routing				NA
46 Three Way Call Transfer				NA
47 Three Way Calling				NA
48 Uniform Seven–Digit Access Number – Remote Call Forwarding				NA
49 800 Service to DID				NA
50 Other BSE				NA
51 Other BSE				NA
52 Other BSE				NA
53 Other BSE				NA
54 Other BSE				NA
55 Other BSE				NA
Total:				

Note: Total Net Revenue = (Sum of revenues less expenses for rows 4 thru 55) – (Revenues less expenses for rows 1 thru 3)

BSEs USED BY AFFILIATE ENHANCED SERVICE PROVIDERS

BASIC SERVICE ELEMENTS	USED BY ESPs A
1 Alternate Routing	
2 Answer Supervision With a Line Side Interface	
3 Automatic Protection Switching	
4 Bridging	
5 Call Denial	
6 Call Detail Recording Reports	
7 Called Directory Number Delivery via 900NXX	
8 Called Directory Number Delivery via DID	
9 Called Directory Number Delivery via ICLID	
10 Calling Billing Number Delivery	
11 Carrier Selection on Reverse Charge Multiline Hunt Group	
12 Conditioning	
13 DID Trunk Queing	
14 Fast Select Acceptance	
15 Faster Signalling on DID	
16 Flexible ANI Information Digits	
17 Line Monitor Service	
18 Make Busy Key	
19 Message Desk (SDMI)	
20 Message Desk (SMDI) – Expanded	
21 Message Waiting Indicator – Activation (Audible)	
22 Message Waiting Indicator – Expanded	
23 Multiline Hunt Group	
24 Multiline Hunt Group – Circular	
25 Multiline Hunt Group – C.O. Announcement	
26 Multiline Hunt Group – Individual Access to Each Port	
27 Multiline Hunt Group – Overflow	
28 Multiline Hunt Group – Preferred	
29 Multiline Hunt Group – UCD with queing	
30 Multiline Hunt Group – Uniform Call Distribution Line Hunting	
31 Network Reconfiguration	
32 Reverse Charge Acceptance	
33 RPOA Preselection	
34 Secondary Channel Capability	
35 Service Code Denial	
36 Statistical Multiplexer	
37 Tandem Routing	
38 Three Way Call Transfer	
39 Three Way Calling	
40 Uniform Seven–Digit Access Number – Remote Call Forwarding	
41 800 Service to DID	
42 Other BSE	
43 Other BSE	
44 Other BSE	
45 Other BSE	
46 Other BSE	

NOTE: Companies should enter an x in Column A for each BSE their affiliate will use.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

FCC 91-48
38109

In the Matter of	)	
	)	
Amendment of Section 73.3525 of the Commission's Rules Regarding Settlement Agreements Among Applicants for Construction Permits	)	MM Docket No. 90-263
	)	
and	)	
	)	
Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases	)	General Docket No. 90-264

ORDER DEFERRING EFFECTIVE DATES

Adopted: February 12, 1991; Released: February 13, 1991

By the Commission:

1. On December 21, 1991, the Commission released Reports and Orders in the above captioned proceedings. Various parties have requested that the effective date of these rule changes be deferred or stayed pending action on petitions for reconsideration.

2. In Docket 90-264, FCC 90-410, the Commission implemented procedural changes to substantially reduce the time consumed in the conduct of comparative hearings and agency review in cases involving applicants for new broadcast facilities. Those changes were scheduled to go into effect on February 13, 1991. The Federal Communications Bar Association (FCBA) has requested partial reconsideration of that Report and Order, suggesting what can fairly be described as a fine tuning of the new rules. The FCBA has also requested that we defer the effective date of the new rules until after action on their petition for reconsideration.

3. We agree with the FCBA's contention that any changes in the new rules, particularly changes that relate to the timing of discovery, would be disruptive to the conduct of on-going proceedings. Thus, we believe that a deferral of the effective date of the new broadcast comparative hearing procedures will facilitate a smooth transition to the new rules, and expedite the conduct of those proceedings. To achieve the earliest possible benefits from the new rules, we intend to act promptly on the petitions for reconsideration.

4. The Report and Order in Docket 90-263, FCC 90-411, amended section 73.3525 of our rules, limiting payments that can be made to settle cases involving applicants for new broadcast

facilities. For settlements filed prior to the commencement of the trial phase of a case, payments would be limited to legitimate and prudent out of pocket expenses. After commencement of the trial, all such payments would be prohibited. The settlement limitations were scheduled to go into effect on March 21, 1991. Melanie Bruton, et al., requests a deferral of the March 21 effective date based on the relationship of that date and the date for payment of hearing fees established in Docket 90-264. The FCBA requests a partial deferral of the effective date of the ban on settlement payments after the commencement of the trial, and Hampton Broadcasting Limited Partnership, et al., filed a Motion for Stay of all settlement payment limitations pending action on its petition for reconsideration.

5. There are significant interrelationships between the comparative hearing reform in Docket 90-264 and the settlement limitations in Docket 90-263 in that procedures to encourage early settlements of comparative cases were intended to work hand-in-hand with the limitations on settlement payments. Thus, deferral of the effective date of comparative hearing reform justifies a deferral of the effective date of the settlement limitations. Moreover, as with hearing reform, to achieve the earliest possible benefits from the new rules, we intend to act promptly on the petitions for reconsideration. [1]

6. Accordingly, IT IS ORDERED that the effective date of the rules and procedures adopted in the Report and Order in Docket 90-264, FCC 90-410, IS DEFERRED until a date to be established in an order disposing of all petitions for reconsideration of that Report and Order.

7. IT IS FURTHER ORDERED that the effective date of the rules adopted in the Report and Order in Docket 90-263, FCC 90-411, IS DEFERRED until a date to be established in an order disposing of all petitions for reconsideration of that Report and Order.

8. IT IS FURTHER ORDERED that the Motion for Stay filed on behalf of Hampton Broadcasting Limited Partnership, et al., IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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1 Having determined that a deferral of the effective date of all settlement payment limitations is warranted, the Hampton stay request is moot.

FCC 91-110
38177

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Evaluation of the Syndication and Financial Interest Rules	)	MM Docket No. 90-162

ORDER

Adopted: April 8, 1991 Released: May 29, 1991

By the Commission: Commissioner Marshall not participating.

1. Before the Commission is a "Petition for Waiver of the Ex Parte Rules and Request for Acceptance of Petition for Second Order Requesting Further Comment" filed April 8, 1991 by the Coalition to Preserve the Financial Interest and Syndication Rule. This petition asks the Commission to waive the ex parte rules (see 47 C.F.R. Section 1.1203) so that it may consider a request to remove the captioned matter from the agenda of the Commission's April 9, 1991 meeting and "solicit additional comments as requested in the attached Petition." "Basic considerations of fundamental fairness" are said to warrant the requested action.

2. We believe under the circumstances of this case, the public interest would be served by granting the request in order to permit consideration of the underlying substantive matters raised by the Coalition.

3. Accordingly, IT IS ORDERED, That the "Petition for Waiver of the Ex Parte Rules and Request for Acceptance of Petition for Second Order Requesting Further Comment" IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FCC 91-111
38178

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Evaluation of the Syndication and Financial Interest Rules	)	MM Docket No. 90-162
	)	

ORDER

Adopted: April 8, 1991 Released: May 29, 1991

By the Commission: Commissioners Marshall and Duggan not participating.

1. Before the Commission is a "Petition for Second Order Requesting Further Comment" in the captioned proceeding filed April 8, 1991 by the Coalition to Preserve the Financial Interest and Syndication Rule. In a separate Order the Commission has waived the ex parte rules to permit consideration of this petition. The petition asks the Commission to seek further comment on proposals to amend the network television financial interest and syndication rules. The petition notes that press reports suggest a proposal may be adopted "that differs dramatically from either of the proposals for which comment was previously solicited."

2. We do not believe that a further delay in the resolution of this matter is warranted. Notice as required by the Administrative Procedure Act has been provided and an unusually full opportunity has already been provided for comment.

3. Accordingly, IT IS ORDERED, That the "Petition for Second Order Requesting Further Comment" IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 91-181
38183

In the Matter of	)	
	)	
Codification of the Commission's Political Programming Policies	)	MM Docket No. 91-168

NOTICE OF PROPOSED RULEMAKING

Adopted: June 13, 1991 Released: June 26, 1991

Comments Due: July 26, 1991
Reply Comments Due: August 14, 1991

By the Commission:

I. Introduction

1. The Communications Act of 1934 imposes special obligations on broadcasters and cable operators with respect to the sale of time to candidates for political office.[1] As sales practices in the industry have evolved over the years, the Commission periodically has taken steps to remind broadcasters and cablecasters about their political programming obligations under the Act. Despite these ongoing efforts, however, we continue to receive numerous questions about the scope and application of our political programming policies.[2]

2. We believe that licensees, media buyers and candidates would all be served if our political programming policies were further codified in writing before the 1992 election season gets underway. We accordingly are issuing this Notice of Proposed

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1 See 47 U.S.C. §§ 312(a)(7) and 315.

2 For example, from August through October, 1990 alone, the Commission's Political Programming Branch received 5,618 inquiries and complaints, 5,360 of which were received by telephone.

Rulemaking to update those policies, either through revised rules, an updated primer on political programming, and/or an official policy statement. Commenters are also requested to submit data on current industry sales practices and to raise additional issues that may be presented by recent changes in those practices.

II. Background

3. Licensees' obligations with respect to "legally qualified candidates for public office" are set forth in Sections 312(a)(7) and 315 of the Communications Act. In general, Section 312(a)(7) requires licensees to give candidates for federal office "reasonable access" to their facilities, or to permit them to purchase "reasonable amounts of time."[3] Section 315(a) states that, if a licensee permits one candidate for a public office to use its station, it must afford all other candidates for that office an "equal opportunity" to use the station.[4] And Section 315(b) provides that, during certain periods before an election, political candidates are entitled to "the lowest unit charge of the station for the same class and amount of time for the same period."[5] At all other times, a station may charge candidates as much as it charges others for "comparable use" of the station.[6]

4. Broadcasters' general obligations under Sections 312(a)(7) and 315 of the Act have been codified by the Commission in Section 73.1940 of its rules. In addition, that rule section provides guidance on how to interpret certain statutory terms and phrases. For example, subsection 73.1940(a) defines who is a "legally qualified candidate for public office," while subsections 73.1940(c) and (e) further explain a licensee's responsibility to provide candidates with "equal opportunities" to use its station. Additional guidance on the proper interpretation of the statutory requirements is provided in the Commission's 1984 primer on political programming, The Law of Political Broadcasting and Cablecasting: A Political Primer.[7]

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3 47 U.S.C. § 312(a)(7).

4 47 U.S.C. § 315(a). Unlike Section 312(a)(7), which applies only to federal candidates, Section 315 applies to all candidates for elective office, whether federal, state or local.

5 47 U.S.C. § 315(b).

6 Id.

7 100 FCC 2d 1476 (1984) ("Political Primer").

5. In recent years, changes in industry sales practices have prompted the Commission to clarify its political programming policies, particularly with respect to interpretation of Section 315(b)'s "lowest unit charge" provision. In 1988, for example, we noted that licensees increasingly were selling time on a preemptible-only basis to commercial advertisers, but at the same time were offering non-preemptible "fixed rate" spots to political candidates. We further observed that many stations were selling commercials on a weekly rotation throughout dayparts, rather than at a particular day and time. These new sales practices prompted us to issue a Public Notice which detailed how the lowest unit charge should be computed in view of these evolving sales practices.[8]

6. In July 1990, the Mass Media Bureau conducted an audit of thirty television and radio stations to assess the broadcast industry's compliance with our political programming rules. The audit revealed that, at a majority of stations surveyed, political candidates paid higher prices for airtime than commercial advertisers.[9] The Bureau found that "[t]he primary reason for the disparity in commercial and political rates is the fact that candidates purchased time at non-preemptible 'fixed' rates while commercial advertisers purchased time at 'preemptible' rates."[10] To the extent candidates' special advertising needs explain their use of a more expensive class of advertising time, there is no necessary conflict between licensees' practices and the Act. However, the audit raised the question whether candidates' advertising choices may be related to a lack of disclosure by broadcasters about their commercial sales practices and a lack of the types of negotiations that often occur between a station and a commercial advertiser.[11] In addition, the audit suggested that some stations may have engaged in practices that are inconsistent with other political programming rules, such as our political file requirements.[12]

7. In order to remind broadcasters and cablecasters of their obligations under the Act and our rules, the Bureau issued a

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8 4 FCC Rcd 3823 (1988) ("1988 Public Notice"). The highlights of the 1988 Public Notice are discussed in § III(C), infra.

9 Mass Media Bureau Report on Political Programming Audit, FCC Release No. 4728 (released September 7, 1990) ("1990 Audit Report") at 3-4.

10 Id. at 5.

11 Id.

12 Id. at 6-7.

report on September 7, 1990 which reviewed the audit's major findings and reiterated a number of guidelines for complying with our political programming policies.[13] The audit report was followed on September 13, 1990 with a series of hypothetical "Questions and Answers" designed to address the most common inquiries the Bureau received after release of the audit report.[14]

8. Despite these educational efforts, we recognize that there is no single, up-to-date written source to which the public can turn for guidance on how to comply with our political programming requirements. Consequently, the Commission continues to receive numerous questions from stations, media buyers and candidates about our political programming policies. For example, although many issues are discussed in the Political Primer, that document has not been revised since 1984 and thus does not include more recent developments, such as the 1988 Public Notice. Similarly, although the 1988 Public Notice, the 1990 Audit Report and the 1990 Questions and Answers offer substantial guidance on certain issues (such as computation of the lowest unit charge), they do not address other important political programming issues that have come to light since the Primer was last updated. We also note that, as industry sales practices continue to evolve, there may be changes in those practices that implicate our political programming policies and should be considered when implementing the statutory requirements.[15]

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13 The Audit Report contained no findings that any of the stations surveyed violated the Communications Act or our rules. The Bureau is continuing to assess whether enforcement actions should be taken against stations whose political programming practices were evaluated as part of the audit.

14 "Questions and Answers Relating to Political Programming Law," FCC Release No. 4805 (released September 13, 1990) ("1990 Questions and Answers").

15 In addition, we observe that some political candidates who ran for office during the 1990 elections have brought suit in state court against broadcast stations alleging violations of Section 315(b)'s lowest unit charge requirements. See, e.g., Zell Miller for Governor et al. v. Pacific & Southern Co., Inc., Civil Action No. 1:91-CV-267-RLV (N.D. Ga. 1991); Dickinson v. Cosmos Broadcasting Company, Inc., Docket No. CV-91-67-R (Mont. Cty., AL 1991). Broadcast stations also have filed actions in federal district court seeking declaratory judgments that candidates may not pursue such claims in either federal or state court, but rather must file all Section 315(b) complaints with the Commission. See American Savannah Broadcasting v. Zell Miller for Governor, et al., Civil Action No. CV491-128 (S.D. Ga. 1991); American Hirsch Broadcasting Co. v. Harvey Sloane Campaign, Civil Action No. S91-0064-C (E.D. Mo. 1991).

9. We accordingly are initiating this proceeding to solicit comment on the proposed codification of our political programming policies and to collect data on current industry trends. In the paragraphs below, we review our present positions on a number of specific issues that we have identified through the 1990 audit process and seek comment on whether our positions should be modified in any fashion. In addition, we invite comment on the interpretations of Sections 312(a)(7) and 315 set forth in the Political Primer, the 1988 Public Notice, the 1990 Audit Report and the 1990 Questions and Answers, and request that parties address whether any of these positions or policies should be modified. We also encourage interested parties to submit data on prevailing industry sales practices that would enable us to assess whether further interpretation or clarification of the statutory political programming requirements is needed. Finally, we invite interested parties to address whether our political programming policies should be codified in revised rules, in an updated political primer and/or in an official Commission policy statement.

III. Discussion

A. Section 312(a)(7): Reasonable Access for Federal Candidates

10. Section 312(a)(7) of the Act requires stations to provide federal candidates "reasonable access" to their facilities. In 1978, the Commission sought comment upon appropriate regulatory measures to implement and enforce this statutory provision.[16] The Commission concluded that additional formal rules would not necessarily be helpful because such rules could not anticipate the varying circumstances under which broadcasters and candidates operate. Instead, the Commission determined that it would continue to rely upon the reasonable, good faith judgments of its licensees to provide reasonable access. It did, however, articulate guidelines that would be applied to determine whether a particular licensee's judgment was reasonable, such as whether a licensee provided access to prime-time programming, absent unusual circumstances; whether a licensee flatly banned federal candidates from access to any types, lengths or classes of time sold to commercial advertisers; whether the station is noncommercial, in which case it would generally not be required to provide spots to candidates if not part of its regular format; whether a noncommercial station refused material submitted by a candidate simply on the basis that

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16 43 Fed. Reg. 12,938 (March 28, 1978).

it had been prepared for a commercial station; or whether a station used access to censor or otherwise exercise control over the content of political material, such as rejecting it for nonconformance with the station's "suggested guidelines."[17]

11. Shortly thereafter, the Commission conformed all of its regulations to track the language of the Communications Act, and included a provision to codify the reasonable access requirement.[18] Section 73.1940(g)(2) of our rules provides:

> the Commission may revoke any station license or construction permit for willful or repeated failure to allow reasonable access to, or to permit purchase of, reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.[19]

12. At this time, we propose to incorporate various Commission guidelines concerning "reasonable access" into a more formal scheme, elaborating where we believe necessary to address changes in station advertising sales practices. This discussion will also incorporate certain relevant rulings that the Commission has made with respect to our interpretation of "reasonable access."

13. "Reasonable access" must be provided through the gift[20] or sale of "uses" of a station by legally qualified candidates for federal elective office.[21] While there is no statutory requirement that a licensee make its facilities available to specific state or local candidates, the Commission has stated that it expects licensees to make reasonable, good faith judgments as

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17 Report and Order, 68 FCC 2d 1079, 1089-94 (1978) ("1978 Order"). See also Political Primer, 100 FCC 2d at 1524.

18 43 Fed. Reg. 45,857 (October 4, 1978).

19 47 C.F.R. § 73.1940(g)(2).

20 We note that an issue has arisen over whether the provision of free advertising time to federal candidates constitutes an improper campaign contribution within the meaning of the federal election laws. We have instructed the Commission's General Counsel to coordinate the resolution of this issue with the General Counsel of the Federal Election Commission.

21 1978 Order, 68 FCC 2d at 1094.

to which races and candidates to cover, and how much time to make available to such candidates.[22]

14. In the case of federal candidates, the Commission has determined that reasonable access must be provided at least during the 45 days before a primary and 60 days before a general or special election.[23] The question of whether access should be afforded before these periods, and when access is required before a convention or caucus, will continue to be determined on a case-by-case basis.

15. The affirmative right of access afforded by Section 312(a)(7) entitles federal candidates to request access to all dayparts, including prime-time, absent unusual circumstances. A licensee may not have any policy flatly banning federal candidates from purchasing any types, lengths or classes of time that the station sells to commercial advertisers. Thus, stations are obligated to negotiate the timing and placement of political advertising with candidates, without pre-existing limitations or bans on the number of or placement of spots.[24] Stated differently, any time that is available to commercial advertisers must also be made available to federal candidates. Federal candidates have the right to formulate their own campaign media strategies, and the broadcaster must negotiate the sale of time on an ad hoc, individualized basis.[25]

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22 Unlike the specific right of access created for individual federal candidates by Section 312(a)(7), the public interest standard "prescribe[s] merely a general duty to afford some measure of political programming." CBS, Inc. v. FCC, 453 U.S. 367, 377-78 (1981) ("political broadcasting [is] one of the fourteen basic elements necessary to meet the public interest, needs and desires of the community"). Under this standard, which "still governs the obligations of broadcasters with respect to political races at the state and local levels[,] . . . some time [must] be given to political issues, but an individual candidate [can] claim no personal right of access" unless there is a Section 315 equal opportunities claim. Id. at 378-79 and n.6. See also Political Primer, 100 FCC 2d at 1525-26, for a discussion of the Commission's pronouncements concerning the access of non-federal political candidates to broadcast facilities.

23 1978 Order, 68 FCC 2d at 1094.

24 1990 Audit Report at 7; see also 1978 Order, 68 FCC 2d at 1094.

25 In such negotiations, however, the broadcaster is permitted to consider such factors as the amount of time the candidate has

16. In this regard, the Commission has previously advised broadcasters that they may choose not to sell time to candidates, including federal candidates, during news programming due to its particular nature.[26] Upon further review, however, we find that the prior Commission decisions cited in support of this conclusion were based not upon any specific "nature" of news programming, but rather upon the fact that the reasonable access requirement of Section 312(a)(7) does not mandate access to specific programming.[27] We seek comment on whether the Commission can or should modify this policy.

17. The Mass Media Bureau has also stated that licensees who choose not to sell time to candidates during news broadcasts cannot then create a special class of non-preemptible time for candidates immediately before or after the news, i.e., so-called "news adjacencies," because broadcasters may not create or sell a special class of time for candidates at a premium rate.[28] We seek comment on this policy as well.[29]

18. The Commission has previously noted that it does not require stations to make "extraordinary efforts" to remain open outside of normal business hours for the purpose of selling political advertising time.[30] However, if a station's business office is "formally closed" but the station is otherwise staffed for purposes of "arranging and providing programming," it may be unreasonable and inconsistent with the requirements of Section

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already purchased and/or utilized, the total number of candidates in the race, and potential programming disruption. 1990 Audit Report at 8. See also CBS v. FCC, 453 U.S. at 387.

26 1990 Questions and Answers at 2; see also 1990 Audit Report at 6.

27 1978 Order, 68 FCC 2d at 1091; Anthony R. Martin-Trigona, 68 FCC 2d 1551 (1977).

28 1990 Questions and Answers at 2.

29 This question may become moot, however, if the Commission modifies its policy regarding placement of political advertisements during news programs.

30 Letter Ruling released July 3, 1990 (DA 99-871).

312(a)(7) to deny access to political candidates.[31] Thus, a station is required to extend to political candidates the same accommodations and efforts with respect to access that it extends to its most favored commercial advertisers.[32] A station also must treat all competing candidates alike when affording access to its facilities.

19. We note that there has been some question as to whether the reasonable access requirements apply to cable television operators. In its most recent pronouncement, the Commission noted that it "does not currently apply section 312(a)(7) to cable systems."[33] This conclusion was based on our assessment that the statutory language that was the basis for any argument that the reasonable access provisions were intended to apply to cable no longer exists. Specifically, we observed that any such obligation vis-a-vis cable would have stemmed from Title I of the Federal Election Campaign Act (FECA),[34] which added Section 312(a)(7) to the Communications Act. Although Title I arguably included cable operators as well as broadcast stations within the universe of communications companies intended to have Section 312(a)(7) obligations,[35] that Title did not specifically amend the

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31 Id.

32 For example, the Bureau has ruled that while the Commission did not intend to create additional burdens upon licensees to provide special access to political candidates over the weekend, we will take note of that licensee's practices with respect to weekend or other "after-hours" access for its most favored commercial advertisers when determining whether that station has complied with its responsibility to provide "reasonable access." Letter Ruling released November 2, 1990 (DA 90-1572). Commenters are invited to address whether stations face additional burdens when making their facilities available to political candidates over the weekend or "after hours" because, for example, the station's "expert" in the sale of political time may need to be available to respond to candidates' inquiries.

33 Subscription Video Services, 51 Fed. Reg. 1821 n.27 (1986).

34 FECA was enacted as Public Law 92-225, approved February 7, 1972; 86 Stat. 3.

35 Title I encompassed six sections, including Section 102 that provided definitions "for the purpose of this title." Section 102(2) provided that "the term 'broadcasting station' has the same meaning as such term under section 315(f) of the Communications Act of 1934." A separate section of FECA, Section 104(c), had amended Section 315 of the Communications Act to add Section 315(f), which stated "for the purposes of this Section [315] . . . [t]he term 'broadcasting station' includes a community antenna

Communications Act to make clear that Section 312(a)(7) extends to cable systems as well as broadcast stations. Accordingly, when Congress repealed Title I of the FECA in 1974, we believe that it may also have repealed any statutory basis for applying Section 312(a)(7) to cable.

20. However, because the stated view of FECA was "to give candidates for public office greater access to the media so that they may better explain their stand on the issues and thereby more fully and completely inform the voters,"[36] we are not certain that Congress did not intend for the Commission to impose Section 312(a)(7) responsibilities upon broadcasters and cable operators alike. Therefore, we request comment on whether we should continue to interpret Section 312(a)(7) as not applying to cable.

B. Section 315(a): Equal Opportunities/Censorship

21. Section 315(a) of the Communications Act provides that if a broadcast licensee permits any legally qualified candidate to use its station, the licensee is required to provide equal opportunities to all other candidates for the same office to use the station. The provision further stipulates that the licensee shall have no power of censorship over material broadcast pursuant to these requirements. Section 315(a) requires broadcast licensees to provide "equal opportunities" to all legally qualified candidates for public office, whether federal, state or local, once one candidate for the same office has been permitted to "use" the station.[37]

22. The candidate "use" that triggers the equal opportunities and access requirements is an appearance by the candidate by voice or picture in broadcast material in which that candidate is identifiable to the broadcast audience.[38] Section 315(a) further provides that bona fide news programming is not a

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television system." Because the definitions in Title I of FECA applied "for purposes of this title," and because Title I also added Section 312(a)(7) using the term "broadcasting station," Title I § 103(a)(2), Section 312(a)(7) arguably was intended to apply to cable.

36 CBS, Inc. v. FCC, 453 U.S. at 379.

37 47 U.S.C. § 315(a).

38 Political Primer, 100 FCC 2d at 1489.

"use" triggering the equal access requirements otherwise imposed. With regard to such exempt programming, we take this opportunity to request broader public comment on one issue addressed in Oliver Productions, Inc., 4 FCC Rcd 5953 (1989), appeal dismissed sub. nom. TRAC v. FCC, 917 F.2d 585 (D.C. Cir. 1990). In that case, the argument was made that a broadcast licensee must maintain complete editorial control over program content in order to qualify for a Section 315(a) exemption, and that a licensee does not have such control if it simply decides whether or not to air a program produced by a third party. We thus request comment on the extent to which licensee control over the program should be a prerequisite to the bona fide newscast exemption, and the criteria for establishing such control.[39]

23. The Commission has advised licensees that, in the event a candidate's name or picture is used by opponents in an advertisement in a disparaging manner, such appearance of the candidate is not a "use" and does not therefore trigger the equal opportunities clause.[40] In other words, if Candidate A (or any supporters of Candidate A) use a picture or other depiction of Candidate B to present Candidate B in a negative light, opponents of Candidate B cannot then claim that B's appearance was a "use" entitling them to equal time. On the other hand, if any unauthorized third party advertiser or programmer uses a picture or other depiction of Candidate B to endorse B, even if Candidate B considers such an endorsement to be harmful because of the nature of the advertiser, such appearance by Candidate B is a "use" that would trigger the equal opportunities provision. To limit such situations, the Bureau has advised licensees that they can adopt a policy by which they sell time only to authorized spokesparties for any candidate, thus allowing the station to refuse access to unauthorized or non-approved third parties. Once a station permits a "use" by any unauthorized third party, however, the equal opportunities clause is triggered. We seek comment upon these various interpretations of what constitutes a "use" under Section 315(a).

24. Section 315(a) also provides that, during a qualified "use," the licensee is prohibited from censoring the content of the broadcast. The Political Primer sets forth a lengthy

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39 Commenters may also address criteria for determining what constitutes a bona fide newcast, but any other issues related to Section 315(a) exemptions are beyond the scope of this proceeding.

40 The FCC staff has advised licensees accordingly, relying upon a report given to Congress in 1981. See Report of the Staff of the Federal Communications Commission on the Operation and Application of the Political Broadcasting Laws During the 1980 Political Campaign, submitted to Senator Goldwater in 1981.

discussion addressing this proscription against censorship of political programming.[41] We wish to take this opportunity to emphasize that, because Section 315 proscribes censorship of a political candidate's "use," the Supreme Court has held that a licensee is immune from liability for damages in civil actions based upon allegations of libel or defamation.[42] It has been our opinion that the same licensee immunity applies to statements made by non-candidates on programs in which there is a "use" by a candidate.[43] If a candidate does not appear, however, the program would not be a "use" and the station may be liable.[44]

25. On a related front, Section 317 of the Act requires that the sponsorship of any material, political or otherwise, broadcast for consideration be disclosed on the air at the time of the broadcast. Currently, licensees rely on broad guidelines to determine whether there has been "sufficient identification" to comply with Section 317. While the Commission has not ruled specifically as to the parameters of "sufficient identification,"[45] licensees can seek some guidance from

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41 Political Primer, 100 FCC 2d at 1510-13.

42 Farmers Educational and Cooperative Union of America v. WDAY, Inc., 360 U.S. 525, 535 (1959).

43 Gray Communications Systems, Inc., 14 FCC 2d 766 (1968).

44 Felix v. Westinghouse Radio Stations, 186 F.2d 1, 5-6 (3rd Cir. 1950), cert. denied, 341 U.S. 909 (1951). The anti-censorship requirements apply to noncommercial as well as commercial stations. For example, the Commission has stated that noncommercial broadcasters may not censor the content of a "use" by a candidate, and therefore may not reject broadcast matter submitted by a political candidate merely on the basis that it was originally prepared for broadcast by a commercial station. 1978 Order, 68 FCC 2d at 1094.

45 In a Joint Public Notice, the FCC and the Federal Election Commission (FEC) also informed broadcast licensees and persons purchasing political broadcast time of ways of complying with both the FCC's rules concerning sponsorship identification and the FEC requirements for candidate authorization notices. Joint Agency Guidelines for Broadcast Licensees Regarding Political Broadcasting, 69 FCC 2d 1129 (1978). However, the notice did not address the specific contours of our requirement that "sufficient identification" of the sponsor of political material be provided.

Commission rulings concerning whether a "use" has occurred, because the Commission has held that to constitute a "use," the candidate must appear on the broadcast station in a manner by which he/she is "identified or identifiable by voice or picture to the general public."[46] Licensees also enjoy broad discretion in determining whether a candidate's appearance meets this test.[47] Under this general standard, the Commission has not previously prescribed specific requirements in terms of lengths of appearances or sizes of captions that will ensure that an appearance is identifiable to the public.[48]

26. It appears, however, that there is increased interest in imposing a more rigorous standard for compliance with the sponsorship identification requirement. For example, Senator McConnell has proposed that, in the case of television broadcasts, the broadcast communication must include a statement setting forth the name of the sponsor that is "clearly readable to the viewer and appears continuously during the entire length of such communication . . . ."[49] In addition, People for the American Way and Media Access Project ("PAW/MAP") have requested a delaratory ruling setting forth minimum sizes and air time for candidate appearances and sponsorship identification purposes. They argue that objective guidelines are necessary to prevent advertisements, particularly negative commercials that attack the opposition, from using inadequate means of identifying the sponsoring candidate, such as small letters or pictures for identification that are difficult to discern or are aired for too brief a time.[50]

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46 Charles F. Dykas, 35 FCC 2d 937 (1972). See also WITL, 54 FCC 2d 650 (1975).

47 Carter/Mondale Reelection Committee, Inc., 80 FCC 2d 285, 286 (1980); WBAX, 17 FCC 2d 316 (1969).

48 In the context of an analogous but not identical situation (i.e., candidate appearances in regular programming), the Commission has articulated some guidelines as to when an appearance is sufficient for identification, thus constituting a "use" for purposes of Section 315(a). See Time, Inc., 55 RR 2d 581 (MMB, 1984) (2-3 seconds not a "use"); Carter/Mondale Reelection Committee, Inc., 80 FCC 2d at 286 (5 seconds is a "use"); National Urban Coalition, 23 FCC 2d 123 (BB, 1970) (4.2 seconds with distant camera range such that candidate was not identifiable not a "use").

49 Comprehensive Campaign Finance Reform Act of 1991, S.143, Section 124.

50 PAW/MAP identify other impediments to ready sponsorship

27. The Commission has received numerous comments generally in support of such proposals. We have already held that identification must be made in a manner that audiences are apprised of the sponsorship, but based upon the unanimous responses to the petition we conclude that objective guidelines would be helpful to both broadcasters and candidates, and that establishment thereof would likely eliminate most of the abuses that may be occurring. Therefore, we will set forth proposed guidelines herein, and parties are invited to comment further on these proposals.[51]

28. In the context of identifying political advertisements, video sponsorship identification must be sufficiently visible to the average viewer to convey the fact of sponsorship and the identity of the sponsor. We therefore propose to interpret Section 317 as requiring, at a minimum, video identification with letters equal to or greater than four percent of the video picture height, and airing of this identification for not less than six seconds. Similarly, for the sake of consistency, for purposes of Sections 312(a)(7) and 315, a "use" would be presumed if the candidate's appearance lasted at least six seconds and the image was equal to or greater than 20 percent of the picture size.

29. While political advertisements meeting these minimum guidelines would be presumed to meet the sponsorship and "use" requirements, this presumption could be rebutted by a showing that the identity of the sponsor or candidate was masked or otherwise difficult to discern due to other factors, such as, for example, lack of picture contrast or inclusion of significant distractions. We emphasize that the purpose of the requirement is to ensure that viewers are informed of the sponsor's identity. Therefore, if factors other than the size of the identification and the length of time it airs prevent viewers from recognizing the fact of sponsorship or the identity of the sponsor, the identification, even though in technical compliance with our guidelines, may still be found to violate Section 317.

30. We note that the guidelines described above would apply to televised advertisements. We seek additional comment

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identification such as presentation on a "busy" background, low contrast against the background, or presentation when there is distracting motion, action or scrolling.

51 In this regard, we believe that the issues raised in the PAW/MAP petition and comments related thereto are more appropriately dealt with in this rulemaking proceeding rather than in the context of a declaratory ruling. Accordingly, we are dismissing PAW/MAP's petition and incorporating the issues raised in the petition as described herein.

upon other guidelines that may be more appropriate for radio. For example, Senator McConnell has suggested, in S.143, that the broadcast include a statement that is clearly audible, aired at the beginning and end of the message, setting forth the name of the sponsor. We seek comment upon standards that would ensure sufficient audibility for such sponsorship identification.

31. The Commission has received suggestions that a video identification (which includes a visual picture of the candidate or sponsor) be required for televised political advertisements. We are concerned, however, that a video-only identification or appearance would not necessarily convey the desired candidate or sponsor identity, particularly for the vision impaired, those viewers not actually watching a program, or those receiving programming from the class of radios that has been specifically designed to receive the audio portion of television programs. The alternative of requiring both audio and video identification or appearance has not been raised for public comment, so we seek comment upon the possibility of adopting such a requirement at this time.

32. Finally, the National Association of Broadcasters has questioned the fairness of requiring adherence to our proposed guidelines if stations do not have an absolute limited right of prior review to ensure compliance with the requirements. We have never required pre-airing submissions, and we are not inclined to adopt such a requirement absent a strong showing that some form of limited review to ensure compliance with the rules is necessary to place the burden of compliance upon the broadcaster.[52] We request comment on this issue.

C. Section 315(b): Lowest Unit Charge

33. Section 315(b) of the Act directs "broadcast stations" (a term which includes cable operators) to charge political candidates "the lowest unit charge of the station" for the same class and amount of time for the same period, during the 45 days preceding a primary election and the 60 days preceding a general or special election. When a candidate purchases time outside these specified pre-election periods, the charges "shall not exceed the charges made for comparable use of such stations for other purposes." Section 73.1940(b) of the Commission's Rules states, in part, that "[a]ll discount privileges otherwise offered

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52 We have, however, indicated that a broadcaster can request such a submission to determine whether sponsorship identification requirements have been met or whether the appearance of the candidate constitutes a "use." Political Primer, 100 FCC 2d at 1512.

by a station to commercial advertisers shall be available upon equal terms to all candidates for public office."

34. Congress added Section 315(b) in 1972 as part of a plan "to give candidates for public office greater access to the media and . . . to halt the spiraling cost of campaigning for public office."[53] By adopting the lowest unit charge requirement, Congress intended to "place the candidate on par with a broadcast station's most favored commercial advertiser."[54] In Hernstadt v. FCC,[55] the Court of Appeals stated that the 1972 amendments "were viewed as providing an additional break for candidates" above and beyond the benefits accorded them under prior law.

35. Over the years, the Commission has articulated a number of basic principles designed to help broadcasters interpret the lowest unit charge provision in view of changing industry sales practices. We invite commenters to address whether these principles remain useful in today's rapidly changing advertising marketplace, and to propose modifications or further clarifications where such changes are believed necessary. We are particularly interested in collecting information about current sales practices in the industry that will enable us to codify clear and updated guidelines for media buyers, candidates and stations. We turn now to a brief review of our existing policies and guidelines concerning interpretation of broadcasters' lowest unit charge obligations.

36. First, the Commission has held that stations may not raise their rates for political candidates during the pre-election period unless the increases result from a station's normal business practices, unrelated to the impending election. Permissible rate increases would include, for example, changes based upon audience ratings changes or seasonal variations.[56] The Commission has further stated that a broadcaster cannot charge a lower rate to Candidate A whose spots appear during the same daypart or program as those of Candidate B if Candidate A made its time purchase months in advance of the broadcast when the

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53 S. Rep. No. 96, 92d Cong., 1st Sess. (1971), reprinted in 1972 U.S. Cong. & Ad. News 1773, 1774.

54 Id. at 1780.

55 677 F.2d 893, 897 (D.C. Cir. 1980).

56 Use of Broadcast and Cablecast Facilities by Candidates for Public Office, 34 FCC 2d 510, 525 (1972) ("1972 Public Notice").

broadcaster's rates were lower.[57] As we held in our 1972 Public Notice,[58] a station's lowest unit charge is the lower of either the rates that appeared on its rate card or that were offered or actually charged for spots airing during the pre-election period.

37. The courts have also held that broadcasters do not have total discretion under Section 315(b) to define the classes of time they sell, reasoning that if they did, stations would be able to define a "political" class of time, with higher rates than other classes, and then offer candidates only "political" time.[59] In keeping with this ruling, the Bureau has stated that broadcasters cannot create a higher-priced class of time for candidates which in reality offers the same likelihood of preemptibility provided to commercial advertisers that purchase less expensive classes of time.[60]

38. In addition, the Commission, citing Hernstadt, has stated that "preemptible with notice" and "run of schedule" time[61] constitute separate classes of time and special discount privileges that must be made available to political candidates if they are also offered to commercial advertisers.[62] The Commission also has held that there is only one class of "immediately preemptible" time for lowest unit charge purposes.[63] We request

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57 1990 Questions and Answers at Question No. 10.

58 1972 Public Notice, 34 FCC 2d at 531.

59 See Hernstadt, 677 F.2d at 900.

60 See 1990 Audit Report at 7; 1990 Questions and Answers at Question No. 1. The basis for this interpretation is set forth in further detail in ¶¶ 47-48, infra.

61 "Preemptible with notice" designates an advertisement that becomes fixed if not preempted by a specific date (e.g., two weeks before the scheduled broadcast). "Run of schedule" advertisements are aired at the convenience of the station and are used to fill in gaps in programming, often on a last minute, ad hoc basis.

62 See 1988 Public Notice, 4 FCC Rcd at 3824.

63 Id. We also believe that there are at least two other types of time that may qualify as separate "classes": non-preemptible and fixed (or "fixed position"). We seek comment on whether these types of time should be considered distinct classes for LUC purposes, and on how each type of time should properly be defined. For example, although the the terms "non-preemptible time" and "fixed time" are sometimes used interchangeably, we understand

comment upon the extent to which the law allows licensees to structure different classes of both preemptible and non-preemptible time.

39. When determining the lowest unit charge for a given class of time, the Commission has attempted to give full effect to Congressional intent that candidates receive the benefit of the lower rates that result from long-term or otherwise favored relationships between commercial advertisers and broadcasters.[64] We have thus held that a candidate is entitled to the lower rates that are offered when commercial advertisers buy time in large bulk amounts or over extended periods of time. As the Commission has stressed, the term "lowest unit charge" contemplates that a candidate will be able to purchase individual spots at the lowest "unit" rate offered or charged, without having to buy on a long term basis or in volume.[65] The Commission also has formulated a "fire sale" policy, which provides that a discount on a particular class of time earned by a last-minute buyer establishes the lowest unit charge for that class of time throughout the pre-election period.[66] We request comment upon how this "fire-sale" policy should apply to different classes of time in light of evolving sales practices.

40. In more recent years, the Commission has recognized that there has been an increasing trend toward selling time on a preemptible basis in a "weekly rotation." Under such a system, stations offer commercial advertisers spots in a particular time frame (except for network television prime time) to appear any time that week. The advertiser in essence agrees that the

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that some broadcasters may use the phrase "non-preemptible time" to refer to time that is guaranteed to run during a certain daypart, program or rotation, but not on a specific day at a specific time. By contrast, the term "fixed time" (or "fixed position") may be used to refer to spots that are assured of running at a set time on a particular day (e.g., Monday at 7:31 p.m.).

64 See 47 C.F.R. § 73.1940(b). For a detailed discussion of Congress' intent that candidates purchasing a single spot receive the volume and frequency discounts available to bulk advertisers, see Hernstadt, 677 F.2d at 897-900.

65 See, e.g., KAYS, Inc., 43 FCC 2d 1183, 1184 (1973); 1972 Public Notice, 34 FCC 2d at 528-29.

66 1988 Public Notice, 4 FCC Rcd at 3823, 3824.

broadcaster may run his commercials on any day (or days) of the week, so long as they run within the times indicated on his contract. In our 1988 Public Notice, we clarified that the lowest unit rate may fluctuate throughout the election season for stations selling preemptible time in weekly rotations.[67]

41. The 1988 Public Notice also explained the applicability of the lowest unit charge provision to immediately preemptible time. As the Commission noted,

> [p]reemptibility enables the broadcaster to "bump" an advertiser paying a lower preemptible rate in favor of an advertiser paying a higher preemptible rate (effective selling rate). Thus new advertisers paying higher rates can preempt incumbent advertisers paying lower rates. Since both advertisers knew the spots they purchased were preemptible, no reason must be given by the broadcaster for a preemption.[68]

As noted above, the Commission considers preemptible spot time to be a single class of time for purposes of calculating the lowest unit charge. Accordingly, the lowest unit charge for an immediately preemptible class of time "is calculated according to the lowest price any advertiser has paid for a spot which has 'cleared' a particular time period or daypart. This rate may fluctuate, depending on how the station sells time, whether on a weekly rotation as in most dayparts, or by the program as in prime time."[69] Candidates who purchase immediately preemptible spots at rates higher than the rate at which preemptible spots have actually cleared are entitled to a refund of the difference.

42. We also have recently confirmed that prices paid for "make good" spots aired in a given daypart must be considered when calculating the lowest unit charge because "make goods" "are an integral part of preemptibility in today's marketplace."[70] We

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67 We also recognized that advertising prices in prime time television may vary from program to program, and clarified that such programs are treated as separate periods of time for lowest unit charge purposes. Because the preemptible rates for a particular program may also vary from week to week based on supply and demand, the lowest unit charge for spots aired during that program could also fluctuate over the course of the pre-election season. 1988 Public Notice, 4 FCC Rcd at 3824.

68 Id. at 3823.

69 Id. at 3824 (emphasis in original).

70 Id. We have previously defined a "make good" as an offer by the station to air or "make good" an advertiser's preempted spot

have further stated that, in order to treat candidates as well as the most favored commercial advertiser, a station must offer candidates "make goods" if they are offered to commercial advertisers, and must also ensure that the candidates' "make goods" air before the election "where the licensee would so treat its most favored commercial advertiser when time is of the essence."[71] Moreover, in the 1990 Questions and Answers, the Bureau stated that our "make good" policy applies even if a station "makes good" only one commercial advertiser's preempted spot within the time frame needed by the advertiser's schedule.[72]

43. During the last election season, the Commission received numerous questions about a broadcaster's duty under Section 73.1940(b) to "make available" to candidates all discount privileges otherwise offered by the station to a commercial advertiser. We believe that this obligation encompasses two related, but distinct, requirements.

44. First, we believe that broadcasters have an affirmative obligation to disclose to candidates information about the rates and package options offered to commercial advertisers. This disclosure obligation is inherent in the broadcasters' obligation to "make available" to candidates all discount privileges offered to commercial advertisers, since a candidate clearly cannot take advantage of such benefits if he is unaware that they exist. Imputing knowledge to candidates or their representatives does not comport with the intent of Section 315(b), which imposes obligations upon broadcasters for the benefit of candidates.

45. Although we believe that it is implicit in the obligations placed on broadcasters by the lowest unit charge requirement, we recognize that the Commission has not previously articulated stations' affirmative disclosure duties. The Bureau, of course, has recently stated its view of the disclosure requirement in the 1990 Audit Report and 1990 Questions and Answers. Specifically, the Bureau has stated that broadcasters must affirmatively disclose to candidates all rates and package options available to commercial advertisers.[73] We seek comment on

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at another, usually later, date and often in the same daypart as originally purchased, rather than make a refund to the advertiser. Id. at 3823. We seek comment on whether this definition is appropriate or whether it should be broadened to encompass other station efforts to run a spot at a later time (e.g., due to technical difficulties).

71 Id.

72 1990 Questions and Answers at Question No. 6.

73 See 1990 Audit Report at 7; 1990 Questions and Answers at

this delineation of the scope of broadcasters' affirmative disclosure obligation.

46. A second obligation inherent in the requirement to make all discount privileges "available" to candidates is the obligation actually to sell to candidates the types of spots and discount privileges made available to commercial advertisers. This obligation means, for example, that a station cannot require candidates to buy only levels of preemptible time that are priced so low that they are unlikely to clear. Similarly, a station cannot refuse to sell candidates intermediate levels of preemptible time that are more likely to clear when the candidates request such levels of time. A station also cannot refuse to sell to candidates preemptible time offered to commercial advertisers, offering candidates only higher-priced non-preemptible time, for the stated reason that the requested daypart, program or rotation is sold out on a preemptible basis. In the 1990 Questions and Answers, the Bureau stated that, "[u]nless an entire inventory in a particular daypart, program, or rotation is sold-out on a non-preemptible basis, candidates must be offered the current selling level of preemptible time."[74] We now question whether it is ever possible for preemptible time to be "sold out," since it would appear that a buyer can simply offer to pay a higher rate and preempt previous purchasers. Commenters are thus encouraged to address this issue as well.

47. We also believe that Section 315(b) prohibits stations from adopting sales techniques that improperly discriminate in favor of commercial advertisers and against political candidates. As previously noted, the purpose of Section 315(b) is to put candidates on par with the station's most favored commercial advertiser.[75] Sales practices which discriminate against candidates and force them to pay higher rates than commercial advertisers seriously undermine Congress' intent in requiring broadcasters to afford candidates the lowest unit charge.

48. Thus, for example, a station cannot create a non-preemptible class of time for candidates and at the same time offer commercial advertisers preemptible spots that in reality are never preempted.[76] To the contrary, broadcasters must charge candidates and commercial advertisers the same rate for functionally equivalent classes of time. If a station sells

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Question Nos. 3-5.

74 1990 Questions and Answers at Question No. 2.

75 See ¶ 34 and n.54, supra.

76 See ¶ 37, supra.

commercial advertisers allegedly "preemptible" time but then assures such advertisers that their spots will not be preempted (as with a fixed placement guarantee), it cannot charge candidates a higher rate for "non-preemptible" time. Similarly, if a station prioritizes its preemptible spots to ensure that the commercials of its most favored advertiser will be the last to be "bumped," it must apply that prioritization policy equally to political candidates as though they were the most favored advertiser.[77]

49. Finally, we note that rapidly changing sales practices in the broadcast industry may be introducing an additional layer of complexity into computations involving the lowest unit charge. It is our understanding that over the years, the industry has moved away from a system based primarily on the sale of volume discounts to a system that uses a "grid card" to give stations greater flexibility when selling their fixed inventory of commercial time. The latest development appears to be the introduction of a "yield maximization" system, under which spots are in essence auctioned off to the highest bidder and the price of a given class of time changes constantly to respond to the station's fluctuating needs.[78] In addition, stations increasingly are offering commercial advertisers customized packages that include additional incentives such as bonus spots, merchandising benefits and "free" promotional announcements.

50. The introduction of these new, more complex sales practices apparently has spawned a variety of novel issues concerning how properly to compute the lowest unit charge. Accordingly, we urge commenters to submit data concerning recent changes in station sales practices and to address the difficulties presented in applying our LUC requirements to such new practices.

D. Political File Requirements

51. Section 73.1940(d) of the Commission's rules requires all licensees to maintain and permit public inspection of a political file consisting of all requests for broadcast time made by or on behalf of political candidates, as well as information concerning the disposition of the request, including any charges imposed. A record of free time provided to candidates is also required. The rule further provides that all information required pursuant to this rule must be placed in the public file "as soon as possible" and must be retained for a two-year period.[79]

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77 As with all other privileges provided to commercial advertisers, candidates must also be informed of the existence of such a prioritization policy.

78 A similar system apparently is used by the airlines industry to sell seats on commercial airplanes.

79 47 C.F.R. § 73.1940(d).

52. The Commission has elaborated upon these requirements, stating that the political file must be complete and self-explanatory. The file must also disclose the class and schedule of time requested and/or purchased by political candidates as well as a schedule of the time that actually aired, and whether it was part of a package or rotation.[80] "As soon as possible" is construed to mean immediately under normal circumstances. In addition, records of political time requests and sales must be retained for two years at the main studio, available for public inspection during normal business hours. If the main studio is located outside the community of license, the file must be kept at any accessible place within the community, such as a public registry, library or attorney's office. Appointments to review the file should not be required. If copies are requested, the licensee must provide them at reasonable cost, and if no copying machine is available, the licensee should permit copies to be made at a convenient location.[81] We seek comment upon whether any of these requirements should be updated or otherwise modified.

IV. Conclusion

53. Our experience in the political programming area reveals that, as sales practices in the industry evolve, questions continue to arise concerning the nature and scope of broadcasters' and cablecasters' obligations under Sections 312(a)(7) and 315 of the Communications Act. We accordingly are initiating this proceeding to solicit comments and data from interested parties about our current interpretations of stations' political programming obligations and the application of those interpretations to changing industry sales practices. The information we receive will be used to explain our political programming rules and policies in greater detail, either through revised rules, an updated primer on political programming or an official policy statement.

54. We believe that the public interest would best be served if our action is completed well before the 1992 elections begin. Comments on the issues raised in this proceeding will thus be due on July 26, 1991, and reply comments will be due on August 14, 1991. No extensions of these dates are contemplated.

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80 1990 Questions and Answers at Question Nos. 11 and 12.

81 Id., citing 47 C.F.R. §§ 73.1940(d), 73.3526.

55. Procedures regarding the filing of comments are set forth in Sections 1.415 and 1.419 of the Commission's Rules. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, DC 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, NW, Washington, DC 20554. The Commission's ex parte rules for non-restricted rulemakings will apply in this proceeding.[82]

56. In addition, IT IS ORDERED that the Petition for Declaratory Relief in the Form of Clarification of Sections 312, 315 and 317 of the Communications Act of 1934, submitted by Media Access Project and People for the American Way, is DISMISSED as moot.

57. An Initial Regulatory Flexibility Analysis is contained in the Appendix to this Notice of Proposed Rulemaking. The Secretary shall cause a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration, as required by Section 603(a) of the Small Business Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 et seq. (1981)).

58. Authority for issuance of this Notice of Proposed Rulemaking is contained in Sections 4(i), 4(j), 301, 303(i), 303(r), 312, 315 and 317 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303, 303(i), 303(r), 312, 315 and 317.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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82 See 47 C.F.R. § 1.1206.

Appendix -- Initial Regulatory Flexibility Analysis

Reason for Action. This Notice of Proposed Rule Making is adopted to obtain comments on existing interpretations of political broadcasting obligations imposed by the Communications Act and to collect data concerning current industry sales practices to permit the Commission to update its rules.

Objectives. The Commission seeks comments and data to enable it to codify and update its political broadcasting policies, either through revised rules, an updated primer on political programming, and/or an official policy statement.

Legal Basis. The proposed action is authorized under Sections 4(i), 4(j), 301, 303(i), 303(r), 312, 315 and 317 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 301, 303(i), 303(r), 312, 315 and 317.

Reporting, Recordkeeping and Other Compliance Requirements. None.

Federal Rules Which Overlap, Duplicate or Conflict With These Rules. None.

Description, Potential Impact, and Number of Small Entities Involved. Any rule changes in this proceeding could affect broadcast licensees. After evaluating the comments in this proceeding, the Commission will further examine the impact of any rule changes on small entities and set forth its findings in the Final Regulatory Flexibilty Analysis.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives. The Notice solicits comments on a variety of issues involving compliance with political broadcasting obligations.

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